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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 523

HARRY GOLDMAN, *Petitioner,*

vs.

GENERAL MILLS, INC., a Corporation.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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OPINIONS BELOW

The memorandum of the district court explaining its order denying respondent's motion to set aside the verdict and enter judgment for respondent (R. 490) is not reported. The opinion of the court of appeals (R. 532) is reported at 184 F. (2d) 359. The dissenting opinion of Circuit Judge Sanborn (R. 545) is reported at 184 F. (2d) 367.

JURISDICTION

The judgment of the court of appeals was entered September 19, 1950 (R. 561). Petitioner's petition for a rehearing was duly filed October 19, 1950 (R. 562, 583), and was denied November 9, 1950 (R. 585). The jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1254(1).

QUESTIONS PRESENTED

1. Whether, in diversity cases, a district court's determination of the controlling local law may arbitrarily be rejected by the court of appeals.

2. Whether a district court's determination of the facts, sustained by the evidence, may arbitrarily be rejected by the court of appeals.

3. Whether, under Minnesota law, a tenant is exculpated from liability in tort for negligently causing the leased premises to burn, by virtue of a covenant in the lease that the tenant will return the premises at the end of the term in good condition, "loss by fire and ordinary wear excepted."

STATEMENT

By lease dated November 1, 1946, the Char-Gale Manufacturing Company leased to General Mills, Inc., respondent, certain premises and the building thereon in an industrial area of Minneapolis for general manufacturing, warehouse and office purposes (R. 1, 4, 77, 78). The lease was to run for a term of ten years commencing January 1, 1947, at a total rental of $150,000, payable in quarterly installments of $3,750 (R. 78-79). In addition the tenant, respondent, was to pay the real estate taxes (R. 79).

The entire lease was introduced in evidence by petitioner and appears in the record (R. 78-89). It contains many provisions usual in leases of industrial properties. One of the most important paragraphs for purposes of this case is entitled, "Tenant to Maintain Surrender Premises in Good Order," and provides:

> "The said Tenant also covenants and agrees with the Lessor as follows: That the Tenant will keep at

its own expense said demised premises and the equipment, plumbing, drains, fixtures, appliances and machinery in, upon, serving or appurtenant to said demised premises, in good repair and in good sanitary condition during said term, and that it will replace at its own expense promptly any and all glass broken in or about said premises with glass of the same quality; and that it will not use or permit anything upon said premises that will increase the rate of insurance thereon, or anything that may be dangerous to life or limb, and that it will not in any manner deface or injure said demised premises, or any part thereof, or overload the floors, or do or permit anything to be done upon said premises or in the passageways, alleys, areas, area-ways, sidewalks or streets adjacent thereto, that will amount to or create a nuisance; and that it will not use said premises or permit the same or any part thereof to be used for lodging or sleeping purposes, or for any purpose contrary to the laws, ordinances or regulations of the United States of America or the state of Minnesota, or the city of Minneapolis, or of any rules or regulations of the city of Minneapolis, or of any boards or officers of said city; and the Tenant agrees to return said premises peaceably and promptly to the Lessor at the end of the term of this lease, or at any previous termination thereof, in as good condition as the same are now in or may hereafter be put in, loss by fire and ordinary wear excepted" (R. 79-80).

The lease's paragraph on "Liability of Lessor and Tenant" provides in part:

"The Tenant further agrees that the Lessor shall not be liable for any damage, either to person or persons or property or the loss of property sustained by the Tenant, or by any other person or persons due to the demised premises * * * being or becoming out of repair or defective, or due to the happening of any accident, or due to any act or neglect of the Tenant, * * * or of any other person, * * * or by the use or misuse of any instrumentality or

agency * * * or occasioned by any nuisance [on the premises] * * *

"The Tenant assumes all liability and obligation on account of all damages on account of the matters and things above referred to, and agrees to save the lessor harmless thereon and therefrom, and to indemnify the Lessor on account thereof * * *" (R. 81-82).

The lease's paragraph entitled "Destruction by Fire" provides in substance that if the premises should be destroyed by fire or the elements so as to be unfit for occupancy, the lessor could terminate the lease and re-enter, and rent would cease; but if the premises could be restored within sixty days, and the lessor within fifteen days elected to do so, then the lease would not end but there would be pro rata abatement of rent during the repair period (R. 83-84).[1]

There is no provision in the lease imposing on either the lessor or the tenant the duty of obtaining insurance (R. 78-89). In fact, there is no reference of any kind in the lease to insurance except the statement that the tenant "will not use or permit anything upon said prem-

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[1]It will be noted from these provisions that, as the trial court instructed the jury (R. 449), "a reading of the lease between these parties does not indicate that the tenant * * * has any right to quit and surrender possession of these premises in the event of fire; and the only rights in the lease in case of fire are reserved to the lessor, that is, the owners of the building. Therefore we must resort to this statute * * * to determine whether or not the defendant (respondent) is still liable for the unpaid portion of the rent, notwithstanding the fact that the building is destroyed." The Minnesota statute referred to is M. S. A., Sec. 504.05, which provides:

"The lessee, or occupant of any building which without fault or neglect on his part, is destroyed or is so injured by the elements or any other cause as to be untenantable or unfit for occupancy, is not liable thereafter to pay rent to the lessor or owner thereof unless otherwise expressly provided by written agreement; and the lessee or occupant may thereupon quit and surrender possession of such premises."

ises that will increase the rate of insurance thereon" (R. 79).

At the end of the lease is the provision:

> "There are no understandings or agreements outside of this lease" (R. 89).

The lease was drawn by an attorney for respondent, after a conference in which such attorney, the attorney for petitioner, and others participated (R. 527).

On or about November 15, 1946, the lessor, Char-Gale Manufacturing Company, entered into a contract with petitioner to sell the premises to him, and about that date also assigned its interest under the lease to petitioner (R. 77, 91, 139, 427, 525). The deed from the company to petitioner was dated January 28, 1947 (R. 2, 4-5).[2]

Petitioner paid $110,000 for the property (R. 139, 427, 526). He financed the purchase in part by executing a mortgage for $80,000 to a Minneapolis bank (R. 256). After his purchase he made substantial improvements to the building (R. 139). He bought the property as income property and one consideration inducing the purchase was the fact that there was a lease from the Char-Gale Company to respondent (R. 145, 527).

Petitioner on or about January 28, 1947, procured from the Indiana Lumbermen's Mutual Insurance Company and maintained in effect, a Minnesota standard fire insurance policy insuring the property for $100,000

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[2]More specifically, after petitioner and his wife received the assignment of lease, they in turn assigned a part interest therein to certain of their relatives, and the premises were deeded to petitioner, his wife and these relatives (R. 4-5, 90-91). However, after the building was destroyed by fire, the claims of the wife and these relatives against respondent were assigned to petitioner (R. 144) and, since it seems immaterial that the wife and these relatives for a time had an interest in the instant claim, petitioner will be referred to throughout this statement as the owner of the premises and assignee of the lease.

against destruction by fire and insuring against loss of rents on account of such destruction in the amount of $15,000 (R. 6, 11, 13, 143, 431). Petitioner limited the insurance to $100,000 on the property because insurance rates were high and he desired to minimize expenses (R. 145).

Respondent entered into possession of the property under the lease in February, 1947 (R. 525). On March 29, 1947, an employee of respondent telephoned petitioner's attorney and told the attorney, "I just received the lease agreement and I want to have an understanding on the fire insurance on the building." The attorney told him that petitioner had fire insurance (R. 237-241).

Respondent used the leased property for the manufacture of small pressure cookers (R. 427). On January 15, 1948, respondent was in sole possession of the leased property (R. 5). On that date, the building was completely destroyed by fire (R. 5, 425). The fire was caused by the negligence of respondent, whose employee carelessly placed a very hot pot under coolant liquid, a mixture of oil and kerosene, which liquid was used as a cooling agent in connection with the operation of one of respondent's machines.[3]

On March 3, 1948, respondent wrote petitioner's attorney that the building had been almost wholly destroyed by fire on January 15, 1948, that in the absence of notice from petitioner of his intention to restore the premises

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[3]The question of negligence is not presently involved. The jury by answers to special interrogatories and by its general verdict found that respondent was negligent and that such negligence proximately caused the fire which destroyed the building, and the trial court emphatically approved this finding (R. 470, 472, 491-492). The opinion of the court of appeals leaves the conclusion of negligence undisturbed, holding only that respondent was exculpated from the consequences of any negligence by virtue of the "loss by fire" provision of the lease quoted, **supra**, in this statement (R. 538-544; 184 F. (2d) at 363-366).

within the time limit prescribed in the lease, which respondent assumed to be a physical impossibility, respondent was treating the lease as having terminated on the date of the fire (R. 93).

About March 8, 1948, the Indiana Lumbermen's Mutual Insurance Company, pursuant to the above mentioned policy, paid petitioner $100,000 on account of destruction of the building and $10,643.90 on account of rent loss, a total of $110,643.90 (R. 143). Thereupon petitioner assigned to the insurance company, to the extent of such payment, petitioner's right to recover satisfaction for the loss sustained by him (R. 143-144).

On March 17, 1948, petitioner commenced suit in the district court to recover damages from respondent on account of its negligent burning of the building (R. 1-3). The gravamen of the action was respondent's alleged negligence (R. 2). Respondent's answer, among other defenses, denied negligence and claimed exoneration from all liability because of the terms of the lease (R. 3-8). The insurance company filed its complaint in intervention alleging its payment of $110,643.90 to petitioner and the above-mentioned partial assignment of petitioner to it (R. 9, 11, 12), and participated in the trial as intervenor (R. 15).[4]

After a lengthy trial at which most of the evidence concerned the issue of negligence not presently involved (R. 16-77, 95-138, 147-236, 241-417), the jury answered in petitioner's favor special interrogatories on negligence, proximate cause and damages, and returned a general verdict in petitioner's favor for $198,678 (R. 470-472). Respondent moved to set aside the verdict and

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[4]Diversity existed in that petitioner is a citizen of Louisiana (R. 1, 139), respondent is a Delaware corporation (R. 1, 3) and intervenor is an Indiana corporation (R. 9, 12).

enter judgment for it, or for a new trial, alleging principally (i) that the court erred in instructing the jury on the measure of damages, (ii) that the finding of negligence was not sustained by the evidence, and (iii) that in any event, respondent was exonerated from liability for negligence by the lease (R. 475-486). The court concluded it had erred on the measure of damages and under FRCP 59(a) awarded a new trial on the question of damages only (R. 500), which is mentioned more fully below.

The court, however, denied respondent's motion in all other respects (R. 501). He held that the evidence amply sustained the jury's finding on negligence and that "a contrary conclusion would itself be error * * *" (R. 491-492). He considered at length, in the light of controlling Minnesota law, respondent's contention that it was exonerated by the lease's provisions from liability for negligence (R. 492-498). After quoting the lease's paragraph, "Tenant to Maintain Surrender Premises in Good Order," quoted *supra,* which concludes with "loss by fire and ordinary wear excepted," the court stated:[5]

> "Whether this underlined provision [*i.e.,* "loss by fire and ordinary wear excepted"] exempts defendant from liability for negligently setting fire to the building depends, as both plaintiff and defendant recognize, upon the intent of the parties to the contract. And that intent is determined by reading the paragraph in its entirety, in light of its purpose and the other provisions of the lease. Commercial Union Assurance Co. v. Foley Bros., 141 Minn. 258, at 260. The provision in question does not expressly relieve defendant for its negligent setting of a fire. It merely refers to 'loss by fire.' It does not refer to the manner, or means, by which the fire is started. So the provision is somewhat ambiguous upon the ques-

[5]In many of the quotations throughout this petition, the designation of the parties is retained as it was in district court, petitioner here having been plaintiff there, respondent here having been defendant there.

tion of whether the defendant was relieved for negligently setting the fire.

"The Court should not construe the provision liberally in favor of an exemption for negligent conduct. For to do so would contradict the public policy which holds that persons who commit a negligent act are responsible for the result of that act. Public policy must be consistent, and, consequently, requires that contracts which seek to negative liability for negligence must be clear, Williston on Contracts, Sec. 1751C, and must be strictly, not liberally construed. That the Minnesota Supreme Court has applied this rule is apparent from the court's refusal to permit the provision in Gross v. General Invst. Co., 194 Minn. 23, 259 N. W. 557, to exempt that defendant from its own negligence.

"The provision of which this alleged exculpatory clause is a part obviously was designed for the benefit of the lessor, not the tenant. For it requires acts favorable to the lessor. It states the duties, not the rights, of the tenant. Its purpose is to protect the lessor from the damages to his property. Consequently, that part of the provision which relates to the loss by fire must be read in light of that purpose. That purpose, obviously, is inconsistent with the construction that the phrase 'loss by fire' was intended to permit defendant to destroy the property negligently by fire.

"Reference to the other parts of the provision also show that, in carrying out the purpose to protect the lessor, the provision did not intend to relieve defendant of negligent acts of any sort. For example, the lessee covenants therein that it will not 'in any manner * * * injure said * * * premises.' And the provision quoted also required defendant not to use or permit anything upon the premises that would increase the insurance or which may be dangerous to life or limb. That such prohibitions intend that negligent operations be prevented is evident. Negligent acts obviously affect insurance rates and would be dangerous to life and limb. And a negligent manner of operation can clearly injure the premises. To

construe that part of the provision relating to fire losses as including fires negligently set by defendant would nullify that intent. The prohibited acts could be committed with respect to fire risk without any danger of liability. The provision must be construed consistently. No good reason is suggested why defendant should be relieved from negligent fires but held responsible for other negligent acts. Defendant does suggest that insurance against fire may be obtained. But it is common knowledge that insurance against other types of negligent and non-negligent acts can also be obtained.

"Moreover, even the phrase following the phrase 'loss by fire' indicates an intent that the so-called exception in which the phrase 'loss by fire' is found was not intended to relieve against negligent acts. The wear spoken of in that phrase is limited specifically to 'ordinary' wear. Like the main part of the paragraph, it does *not* include negligent wear. It is consistent with the provision's purpose to protect the lessor against injuries to the property through the acts and occupancy of the tenant. And by its own terms it is consistent with the other phrases of the provision which show an intent that defendant should be liable for its negligent acts and protect the lessor from them. It does not relieve defendant of negligence. Because the phrase referring to loss by fire is directly related to the phrase concerning wear, it must be interpreted with that phrase in mind. Not to do so would ignore the relationship between parts of the same exception as well as parts of the same paragraph. In view of these premises, therefore, it seems clear that the phrase 'loss by fire and ordinary wear * * * excepted' does not relieve defendant from liability for negligently setting fire to plaintiff's building" (R. 492-494).

"Defendant points out that plaintiff carried fire insurance on the premises and that defendant was obligated by the lease to maintain the premises so as not to increase the insurance rates. But because the lessor is the party who carries fire insurance on the building does not mean that the parties intended

that the tenant could negligently destroy the building by fire without liability to anyone. The lease does not require the lessor to carry any insurance, and if the acts of the parties as to insurance procurement are to carry weight in determining the intent of the lease as to defendant's liability for negligently destroying the property by fire, it is very significant to note that the policy which plaintiff obtained with defendant's knowledge does not purport to cover the negligent acts of defendant in causing the fire, nor to protect defendant against any loss. On the contrary, the policy which plaintiff obtained shows that the insurance was intended to protect plaintiff. Defendant's contention that because plaintiff could obtain insurance against fire losses, it should have been entitled to assume that it would not be liable for negligently setting a fire really concerns what might have been arranged, or what could have been done, not what was intended in this particular situation. And defendant's position in this regard is contrary to the rule that persons are liable for their negligent acts unless clearly relieved of them in the particular situation * * *" (R. 495-496).

"Defendant urges that the intervening insurer should not be subrogated to plaintiff's claim for negligence against defendant. But because plaintiff obtained insurance for himself does not mean that he also was obligated to obtain insurance at his expense for the benefit of the defendant, who was receiving the use of the property by the payment of annual rent. Defendant assumes and contends that the insurance premiums were paid with the rent money received by the plaintiff and therefore that the defendant should be given the benefits of the insurance purchased and paid to the plaintiff. But there is no evidence that plaintiff paid the premiums out of his rent, rather than from any other funds on hand. Defendant has not shown that the premiums which the insurance company received were derived from the rental payments. No separate part of the rent money was earmarked for insurance money

> and part for rent. And it does not appear that the insurance premiums entered into the determination of the rental price. This is evident from the conferences between the parties after the lease was executed. The parties at that time were not certain who should procure the insurance and the understanding was that plaintiff assumed the responsibility for the insurance coverage on the building for fire, windstorm, etc. The amount of the insurance was left to the plaintiff. At his option, he could carry full coverage, or a sum much less than the value of the building if he so desired. It seems obvious, therefore, that no definite amount was included within the rent to cover insurance premiums, as defendant's argument assumes. To deny subrogation to the insurer because the amount of plaintiff's rent may have indirectly included allowance for insurance premiums would weight that factor more than the record justifies" (R. 496-497).

Pursuant to the aforementioned order granting a new trial on the issue of damages only (R. 501), the case was called for trial on that issue (R. 502). The parties thereupon duly stipulated that if such issue were tried, the jury would return a verdict for $142,500 in petitioner's favor including interest to that date, October 12, 1949 (R. 502-503). Pursuant to this stipulation, judgment for petitioner was entered on October 12, 1949 for $142,500, reserving full rights of appeal (R. 504-505).[6] The court held that it was not necessary to enter a judgment in intervenor's favor, as requested by intervenor, because intervenor had an interest in petitioner's judgment and could participate in the appeal fully, since the judgment

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[6]Taking the stipulated amount, $142,500, as the loss resulting from the fire, it will be noted that petitioner, by virtue of the court of appeals' reversal, is out $31,856.10, the difference between the stipulated loss and the insurance company's payment to him of $110,643.90, plus interest from October 12, 1949, and costs.

in petitioner's name was in effect a judgment in trust for intervenor to the extent of the latter's interest (R. 510).

Respondent appealed to the court of appeals from the judgment entered for petitioner, contending principally (i) that the evidence was insufficient to sustain the finding of negligence, (ii) that respondent's liability, if any, should be limited to such amount as petitioner's loss on the building exceeded his insurance recovery, and (iii) that respondent was wholly exonerated from liability for any negligence by virtue of the "loss by fire" provision of the lease. The majority opinion of the court of appeals did not consider claims (i) or (ii), but reversed the judgment for petitioner and ordered judgment for respondent on the sole ground that respondent was exonerated by the lease from any liability for negligence (R. 538-544; 184 F. (2d) at 363-366).

The rationale of the majority opinion is that there was a "mutual understanding of the parties when the lease was entered into that loss by fire should be provided against by fire insurance coverage" (R. 539; 184 F. (2d) at 364); that the circumstances "indicate the intention that the cost of insurance would be taken out of the rentals" and "In practical effect the tenant paid the cost of the fire insurance"; that "in the light of all the provisions of the lease, the circumstances of its execution and the understanding about fire insurance coverage to which the lease was related" the expression "loss by fire" should be taken to include loss by fire caused by negligence (R. 543; 184 F. (2d) at 366).

Circuit Judge Sanborn, in dissenting, did not attempt "a dissection and criticism of the majority opinion" but rather preferred "to submit as my dissent the opinion prepared by me, showing how I believe the case should be decided" (R. 545; 184 F. (2d) at 367). Therefore his

opinion is framed to be dispositive of all issues raised by the appeal, on the assumption of affirmance of the district court's judgment. After stating the facts substantially as given in this statement (R. 545-550; 184 F. (2d) at 367-369), he points out that "The applicable substantive law is that of Minnesota" (R. 550; 184 F. (2d) at 369) and that "Concededly, there is no Minnesota case holding that a covenant such as that here involved has the effect which [respondent] asserts should be given to it" (R. 551; 184 F. (2d) at 370).

Judge Sanborn then states:

> "It seems to me that the covenant to surrender the premises in good condition, 'loss by fire and ordinary wear excepted,' reasonably may not be construed to relate to the lessee's tort liability, but only to its contractual liability to make repairs or rebuild in case of the destruction of the building by fire. Apparently the reason for inserting exceptions, such as those here involved, in surrender clauses of leases was to relieve a tenant, who had agreed to keep the premises in repair, from any contractual liability to repair or rebuild structures injured or destroyed by fire or from having to answer in damages measured by the reproduction cost of such structures" (R. 551; 184 F. (2d) at 370).

Judge Sanborn then reviews the Minnesota authorities which he believes substantiate the foregoing, and states:

> "The case of Wright v. Tileston, 60 Minn. 34, 37-38, 61 N. W. 823, 824, I think clearly indicates that a tenant's tort liability for negligence and carelessness causing damage to leased premises is something quite apart from the tenant's contractual liability to pay rent or make repairs, and that the exceptions contained in the conventional surrender clause of a lease do not exonerate the tenant from his tort liability, even though the damage is caused by one of the elements referred to" (R. 553; 184 F. (2d) at 370-371).

In concluding his opinion on the point of respondent's claimed exculpation from liability for negligence, Judge Sanborn states:

> "But even if the question of the asserted exoneration of the defendant under the exception 'loss by fire' in the surrender clause of the lease were doubtful—which I think it is not—this Court should accept the views of the District Court as to that question of local law. Magill v. Travelers Insurance Co. (8th Cir.), 133 F. (2d) 709, 713; Doering v. Buechler (8th Cir.), 146 F. (2d) 784, 788; Russell v. Turner (8th Cir.), 148 F. (2d) 562, 564; Mast v. Illinois Central R. Co. (8th Cir.), 176 F. (2d) 157, 163; Northern Liquid Gas Co. v. Hildreth (8th Cir.), 180 F. (2d) 330, 336" (R. 554; 184 F. (2d) at 371).[7]

Petitioner duly petitioned for rehearing, pointing out among other things that the majority's assumption that there was a "mutual understanding of the parties * * * that loss by fire should be provided against by fire insurance" was wholly unsupported by the evidence (R. 562-583), but the petition resulted in no relief for petitioner other than correction of the court of appeals' order on costs (R. 585).

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[7]The opinion thereafter concludes that the finding of negligence is sustained, the court's instruction on liability and its limitation of the new trial to the issue of damages alone correct, and that, under controlling Minnesota law, it is of no concern to respondent that the insurer is entitled to recoup its loss out of what respondent owes petitioner (R. 554-560; 184 F. (2d) at 371-374).

SPECIFICATION OF ERRORS TO BE URGED

The court of appeals erred:

1. In rejecting the district court's clearly correct determination of Minnesota law.

2. In substituting its own determination of fact for that of the district court.

3. In holding, without any support in the evidence, that there was a mutual understanding between the parties when the lease was entered into that loss by fire should be provided against by fire insurance.

4. In assuming, contrary to Minnesota law, that petitioner's procurement of fire insurance relieved respondent from liability for negligently causing the fire.

5. In holding, contrary to Minnesota law, that respondent is exculpated from liability for negligently causing the fire by reason of the lease's covenant that respondent would return the premises in good condition, "loss by fire and ordinary wear excepted."

6. In reversing the judgment for petitioner.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

Preliminary Statement.

As noted, the lease provides:

> "* * * and the tenant agrees to return said premises * * * at the end of the term of this lease, or at any previous termination thereof, in as good condition as the same are now or may hereafter be put in, loss by fire and ordinary wear excepted" (R. 80).

Chief Judge Nordbye of the U. S. District Court for the District of Minnesota, after exhaustive considera-

tion, reached the conclusion that under Minnesota law the foregoing covenant does not exculpate respondent from liability for negligently causing the fire (R. 490-498). Chief Judge Nordbye's entire legal career, commencing in 1912, has been in Minnesota; he has been in judicial service in Minnesota continuously since 1922.[8] Circuit Judge Sanborn, the only judge on the court of appeals from Minnesota, completely and explicitly concurred with Judge Nordbye (R. 545; 184 F. (2d) at 367). All of Judge Sanborn's legal career, which commenced in 1907, was in Minnesota until his appointment in 1932 as circuit judge.[9]

Nevertheless the majority of the court of appeals, without citing a single Minnesota or other authority respecting the covenant's meaning, has refused to follow the determination of Minnesota law made by these experienced Minnesota jurists. It is respectfully submitted that, in thus refusing, the court in an important matter has so departed both from controlling Minnesota law and the accepted and usual course of judicial proceedings, as to require this Court's exercise of its certiorari jurisdiction.

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[8]"Nordbye, Gunnar Hans * * * judge; * * * LL.B., U. of Minn., 1912; * * * In practice of law at Minneapolis, Minn., 1912-22; judge of Municipal Court, Minneapolis, 1922-25; judge Dist. Court, 4th Minn. Jud. Dist., 1925-31; judge U. S. Dist. Court, Dist. of Minn., since 1931 * * *." Who's Who in America, Vol. 25, 1948-49, p. 1838.

[9]Sanborn, John B., judge; b. St. Paul, Minn. * * * A.B., U. of Minn., 1905; LL.B., St. Paul Coll. of Law, 1907; * * * Admitted to Minn. bar 1907, and began practice at St. Paul; * * * mem. Minn. Ho. of Rep. 1913-15; atty. and trust officer Capitol Trust & Savings Bank, St. Paul, 1914-16; Commr. of Insurance, Minn., 1917-18 and Jan. 1919-July 1, 1920; membr. Minn. Tax Comm., 1920-21; judge of Dist. Court, Minn., 1922-25; U. S. Dist. Judge, Dist. of Minn., 1925-32; U. S. Circuit Judge, 8th Circuit, since Jan. 23, 1932 * * *." Who's Who in America, Vol. 25, 1948-49, p. 2156.

I.

The Matter Involved Is Important.

Covenants in leases substantially identical with that here involved, providing that the lessee shall, at the termination of the lease, return the premises to the lessor in good condition, "loss by fire and ordinary wear excepted," apparently are standard covenants in American leases. See *Gordon, Standard Annotated Real Estate Forms* (1938), No. 296, p. 598; *Jones, Legal Forms Annotated* (9th Ed., 1946), No. 41-103, p. 1302. Whether or not such a covenant exculpates a lessee from liability for fire caused by his negligence, is obviously a question of general interest throughout the United States.

II.

The Court of Appeals Has Decided an Important Question of Minnesota Law in a Way in Conflict With Applicable Local Decisions.

and

III.

Has So Far Departed from the Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise of This Court's Power of Supervision.

Reasons II and III are dependent upon substantially the same facts and may be considered together.

(1)

*The court of appeals arbitrarily rejected the trial court's clearly correct determination that, under Minnesota law, the "loss by fire * * * excepted" covenant does not exculpate respondent from negligence.*

The opinion of Circuit Judge Sanborn shows that the trial court was clearly right in his determination of Minnesota law (R. 550-553; 184 F. (2d) at 369-371). As Judge Sanborn concludes, the controlling Minnesota case is *Wright v. Tileston,* 60 Minn. 34, 61 N. W. 823. In that case the lessor's assignee first recovered a judgment against the lessee on the lessee's covenant to pay rent. Then the assignee sued the lessee for the lessee's negligence in caring for the leased premises, a dam for the use of water power and appurtenances. The lease contained the covenant that the lessee "will, at the expiration of the time, * * * quietly yield and surrender the aforesaid premises * * * in as good condition and repair as when he took them, reasonable wear and tear and damages by the elements alone excepted" (60 Minn. at 37). The lessee's defense was that the suit was on this covenant and was barred by the first judgment on the covenant for rent. The Minnesota Supreme Court unanimously affirmed the striking of this defense, holding that the action was one for tort purely, although the existence of the lease furnished the opportunity for committing the tort. The court, after quoting the above covenant, said:

> "* * * The very exception stated in the lease, in connection with the allegation that the damages were caused by high water, and through the negligence and careless management of the premises by the defendant, takes the complaint entirely out of the rule contended for by the defendant. By the explicit terms of the lease, he was not to return the premises in as good condition and repair as when he took them, if the damages to the premises were the result of the elements. This is the exact damage which it is alleged resulted to the premises; that is, by the element of water coming upon the premises in such a flood or torrent that the wing of the dam was totally destroyed and the premises otherwise greatly

injured and damaged, and that this result was caused by the negligent and careless management of the property by the defendant. That a tenant is liable for negligence and carelessness in the management of the leased premises, whereby damage results to such premises, is quite clear as a matter of law. Of course, upon this view of the case, the former judgment is not a bar to the plaintiff's maintaining this action." (60 Minn. at 37-38.)

Judge Sanborn correctly epitomizes the holding of *Wright v. Tileston* and its controlling effect here:

"The case of *Wright v. Tileston,* 60 Minn. 34, 37-38, 61 N. W. 823, 824, I think clearly indicates that a tenant's tort liability for negligence and carelessness causing damage to leased premises is something quite apart from the tenant's contractual liability to pay rent or make repairs, and that the exceptions contained in the conventional surrender clause of a lease do not exonerate the tenant from his tort liability, even though the damage is caused by one of the elements referred to" (R. 553; 184 F. (2d) at 370-371).

As Judge Sanborn stated: "Concededly there is no Minnesota case holding that a covenant such as that here involved has the effect which [respondent] asserts should be given to it" (R. 551; 184 F. (2d) at 370). We believe there is no such case in Anglo-American jurisprudence. In any event, neither counsel on either side, the district court, nor either opinion in the court of appeals, cites one. The Minnesota rule is the declared rule wherever the *precise* point here raised has been decided—whether the covenant involved exculpates from liability in *tort* for *negligence.* As Judge Sanborn pointed out:

"In 32 Am. Jur., Landlord and Tenant, Sec. 783, page 669, it is said:

> '* * * A tenant is, however, liable for injury to his landlord from the destruction by fire of a building on the demised premises caused proximately by the tenant's negligence, even though the lease contains a provision that at the end of the term he shall yield possession "subject to loss by fire" ';
>
> citing *Brophy v. Fairmont Creamery Co.*, 98 Neb. 307, 152 N. W. 557, and *Carstens v. Western Pipe & Steel Co.*, 142 Wash. 259, 252 Pac. 939. These cases unquestionably support the text" (R. 553; 184 F. (2d) at 371).[10]

It will be noted that the opinion of the court of appeals does not cite a single authority, Minnesota or otherwise, in respect of the meaning of the covenant involved. The authorities it cites concern the propositions that public policy favors the enforcement of a contract as actually made, and that under Minnesota law a contract between private parties to relieve one of the parties from liability for negligence is permissible (R. 544; 184 F. (2d) 366) —propositions not disputed.

It is noteworthy that the court below, less than two months after the instant decision (three different judges sitting), affirmed a judgment for a lessor in his suit against the lessee for negligently causing the leased

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[10]The case most helpful to respondent's claim is **Slocum v. Natural Products Company**, 292 Mass. 455, 198 N. E. 747. But, as Judge Sanborn points out, that case is not controlling or even persuasive (R. 553; 184 F. (2d) at 371). It was a suit in **contract** for breach by the lessee of a covenant in the lease "to make all repairs, both outside and inside usual or necessary * * * damage by fire or unavoidable casualty only excepted." The court held that this exception included a fire resulting from negligence, insofar as an action in contract was concerned, but stated: "It does not necessarily follow that the lessors would have no action in tort for the damage sustained" (292 Mass. at 457). In **Commercial Union Assur. Co. v. Foley Bros.**, 141 Minn. 258, 169 N. W. 793, heavily relied on by respondent below, the exculpatory clause in the lessor's favor by its very terms necessarily included negligence, reading "for or on account of any loss or damage sustained by water or fire howsoever coming or being within said premises" (141 Minn. at 259).

building to burn. *Standard Brands v. Bateman* (8th Cir., Nov. 13, 1950), 184 F. (2d) 1002. In that case the lease provided that the lessee at the end of the term would surrender the premises in as good condition as received "reasonable wear and tear and damages by the elements only excepted" (184 F. (2d) at 1006). The court made clear its obligation to follow the local law in a diversity case (184 F. (2d) at 1006-1007) and that, in deciding a disputed question of local law, it would "defer to the opinion of the trial court who is a Missouri lawyer of long experience and who has been a justice of the Supreme Court of that state" (184 F. (2d) at 1011).

This express acknowledgment of the principles which should control a court of appeals in reviewing a diversity case, made less than two months after the instant decision, throws into clear focus the serious departure of the instant decision from the accepted and usual course of judicial proceedings.

We therefore submit that the refusal below to follow on a question of Minnesota law, the experienced trial court's clearly correct determination thereof, fully concurred in by the only Minnesota jurist on the court of appeals, was such a departure from the accepted and usual course of judicial proceedings as to call for certiorari.

Cf. *Thompson v. Consolidated Gas Co.* (1937), 300 U. S. 55, 74-75.

Henderson Co. v. Thompson (1937), 300 U. S. 258, 266.

Reitz v. Mealey (1941), 314 U. S. 33, 39.

MacGregor v. State Mutual Co. (1942), 315 U. S. 280, 281.

Helvering v. Stuart (1942), 317 U. S. 154, 163.

Steele v. General Mills (1947), 329 U. S. 433, 439.

(2)

The court of appeals arbitrarily and in violation of a cardinal rule of appellate procedure substituted its determination of fact for that of the trial court.

The underlying premise of the court of appeals' reversal is that there was a "mutual understanding of the parties when the lease was entered into that loss by fire should be provided against by fire insurance coverage" (R. 539; 184 F. (2d) at 364).

Not only is this premise wholly unsupported by the evidence, but it is directly contrary to the trial court's careful determination of the relevant facts, made in connection with his construction of the lease. This most succinctly appears by contrasting the court of appeals' determinations with those of the trial court:

(i)

Court of appeals:

"The circumstances also indicate the intention that the cost of the insurance would be taken out of the rentals. The investing for income purposes of their own and the borrowed money by the plaintiff's predecessors necessarily involved computing the rentals promised in the lease and deducting the cost of fire insurance at the applicable high rate. They could not estimate the income without considering both factors. They necessarily consciously figured on the rentals to be paid by the tenant as the source of the fire insurance premium and intended that the cost of insurance was to come from the tenants. In practical effect the tenant paid the cost of the fire insurance" (R. 543; 184 F. (2d) at 366).

District court:

"Defendant assumes and contends that the insurance premiums were paid with the rent money received by the plaintiff and therefore that the defendant should be given the benefits of the insurance

purchased and paid to the plaintiff. But there is no evidence that plaintiff paid the premiums out of his rent, rather than from any other funds on hand. Defendant has not shown that the premiums which the insurance company received were derived from the rental payments. No separate part of the rent money was earmarked for insurance money and part for rent. And it does not appear that the insurance premiums entered into the determination of the rental price. This is evident from the conferences between the parties after the lease was executed" (R. 496-497).

(ii)

Court of appeals:

"But we think the court erred in attempting to ascribe an intent and meaning to the exception of loss by fire provision of this lease independent of the mutual understanding of the parties when the lease was entered into that loss by fire should be provided against by fire insurance coverage and that the conclusion and judgment the court arrived at were erroneous" (R. 539-540; 184 F. (2d) at 364).

"The landlords here agreed that the tenant should not be liable to pay for 'loss by fire' because it was understood between them that fire insurance would be taken out and a fire insurance company would be required to pay for any 'loss by fire' occurring on the premises during the term of the lease" (R. 540; 184 F. (2d) at 364-365).

District court:

"Defendant's contention that because plaintiff could obtain insurance against fire losses, it should have been entitled to assume that it would not be liable for negligently setting a fire really concerns what might have been arranged, or what could have been done, not what was intended in this particular situation" (R. 496).

"But because plaintiff obtained insurance for himself does not mean that he also was obligated to

> obtain insurance at his expense for the benefit of the defendant, who was receiving the use of the property by the payment of annual rent" (R. 496).

In thus rejecting the trial court's determinations of fact, the court of appeals violated the cardinal rule of review, repeatedly emphasized by it, that the appellate court should not substitute its judgment on the facts for that of the trial court.

Storley v. Armour & Co. (8th Cir., 1939), 107 F. (2d) 499, 505.

Cleo Syrup Corp. v. Coca Cola Co. (8th Cir., 1943), 139 F. (2d) 416, 417-418, cert. denied 321 U. S. 781.

Woods v. Benson Hotel Corporation (8th Cir., 1949), 177 F. (2d) 543, 545.

Cf. *Nolley v. Chicago, M. St. P. & P. R. Co.* (8th Cir., 1950), 183 F. (2d) 566, 572.

It is submitted that such a violation calls for this court's supervision.

(3)

The court of appeals arbitrarily rejected the district court's determination of Minnesota law on the effect of petitioner's procurement of insurance.

The court of appeals' assumption that there was a "mutual understanding of the parties when the lease was entered into that loss by fire should be provided against by fire insurance coverage" (R. 539; 184 F. (2d) at 364) is so devoid of support[11] as to indicate that the court really

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[11]It will be noted that (i) fire insurance was not procured until January 28, 1947, approximately three months after the execution of the lease on November 1, 1946, 2½ months after petitioner's purchase of the property, and 28 days after the first day of the lease's term (R. 6, 78, 89, 90, 525). On March 29, 1947, approximately five months after execution of the lease, respondent inquired of petitioner as to who was

is holding that petitioner's mere procurement of insurance somehow exonerates respondent.[12] But this is directly contrary to Minnesota law. As Circuit Judge Sanborn put it:

> "That the insurer is entitled to recoup its loss out of what the [respondent] owes [petitioner] for having negligently destroyed the insured building, is in my opinion, of no legal concern to the [respondent]" (R. 560; 184 F. (2d) at 374).
>
> *Evans v. Chicago, M. & St. P. Ry. Co.*, 133 Minn. 293, 158 N. W. 335.
>
> *Solberg v. Minneapolis Willys-Knight Co.*, 177 Minn. 10, 224 N. W. 271.
>
> *Donohue v. Acme Heating S. M. & R. Co.*, 214 Minn. 424, 8 N. W. (2d) 618.

Such departure from the controlling Minnesota law, as determined by the experienced district court, invokes the certiorari jurisdiction.

See cases decided by this court, cited under (1), page 22, *supra*.

(4)

Assuming the points of Minnesota law to be doubtful, there was no justification for reversing the experienced district court's determination thereof.

Circuit Judge Sanborn succinctly puts what is an additional reason for certiorari:

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responsible for fire insurance (R. 237, 239); (ii) petitioner agreed to buy the property, and took as assignee of the lease from his predecessor Char-Gale Manufacturing Company, on November 15, 1946, or about two weeks after the lease was executed between said predecessor and respondent (R. 77, 78, 91, 139, 427, 525); (iii) the lease contains the tenant's covenant "to save the lessor harmless" from "any act or neglect of the tenant" (R. 82); and (iv) the lease concludes with the provision, "There are no understandings or agreements outside of this lease" (R. 89).

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[12]Even assuming exoneration of respondent, on some theory, to the extent of petitioner's insurance recovery, it is to be noted that petitioner, by virtue of the court of appeals' reversal, is out $31,856.10, plus interest and costs, over and above such insurance recovery. See footnote 6, **supra**.

"But even if the question of the asserted exoneration of the defendant under the exception 'loss by fire' in the surrender clause of the lease were doubtful—which I think it is not—this Court should accept the views of the District Court as to that question of local law. *Magill v. Travelers Insurance Co.* (8th Cir.), 133 F. (2d) 709, 713; *Doering v. Buechler* (8th Cir.), 146 F. (2d) 784, 788; *Russell v. Turner* (8th Cir.), 148 F. (2d) 562, 564; *Mast v. Illinois Central R. Co.* (8th Cir.), 176 F. (2d) 157, 163; *Northern Liquid Gas Co. v. Hildreth* (8th Cir.), 180 F. (2d) 330, 336" (R. 554; 184 F. (2d) at 371).

CONCLUSION

Wherefore it is respectfully requested that this petition for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit be granted.

Dated: Minneapolis, Minnesota, January, 1951.

DAVID W. LOUISELL,

IRVING H. GREEN,
Minneapolis, Minnesota,
Counsel for Petitioner.

FILED
MAR 2 1951

IN THE

Supreme Court of the United States

October Term, 1950

No. 523

HARRY GOLDMAN, *Petitioner,*

vs.

GENERAL MILLS, INC, a Corporation,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit and the dissent are reported in 184 Fed. (2d) 359 and appear in the record herein at pages 532-560.

STATEMENT OF ADDITIONAL FACTS

Respondent deems Petitioner's statement of facts incomplete.

The chronological history of the entire continuing transaction of leasing, purchasing, procuring insurance and taking possession of the premises, which commenced

prior to November 1, 1946, and continued through February 1, 1947, is as follows: Irving H. Green, son-in-law of and attorney for Petitioner, for several months prior to November, 1946, had a listing from Char-Gale Manufacturing Company, the then owner, for the sale of the premises (R. p. 526). Shortly before November 1, 1946, Mr. Green and the Petitioner decided to purchase the premises themselves upon the condition that a lease of the premises could be negotiated (R. p. 522). On behalf of himself, Petitioner and their respective wives, Mr. Green negotiated with E. K. Thode, Vice President of Respondent, and A. Lyman Beardsley, one of its attorneys, with respect to the terms and the form of a lease with Respondent. The terms in general were agreed upon, and Mr. Beardsley thereupon prepared the form of lease (R. p. 527). There being uncertainty as to whether the lease would be executed by Char-Gale Manufacturing Company or by Petitioner and his associates as lessors, the following provision was inserted:

"Execution by Lessor

"This lease, which is dated the first day of November 1946, is executed by General Mills, Inc., as Tenant upon condition that it shall be valid and remain in force and effect only if it be executed and acknowledged on or before November 20, 1946, by a Lessor then having in the opinion of counsel for Tenant, good and merchantable title to the premises herein described" (R. p. 87).

The lease was executed by Respondent on November 1, 1946, and was actually executed by the then owner, Char-Gale Manufacturing Company, on the same date (R. p. 89).

Sometime before November 15, 1946, Mr. Green signed a contract with Char-Gale Manufacturing Company for the purchase of said premises for the sum of $110,000,

providing for a down payment of $1,000, $29,000 on November 15, 1946, and $80,000 February 1, 1947 (R. pp. 524-525). On November 15, 1946, Petitioner and his associates paid the additional $29,000 and took an assignment of the lease in Petitioner's name but for the benefit of the four purchasers (R. p. 525). The thirty thousand dollars of the purchase price was furnished by the four purchasers (R. p. 526).

On January 28, 1947, Petitioner and his wife assigned an undivided half interest in said lease to Irving H. Green and his wife (R. pp. 90-91). On about February 1, 1947, Petitioner and his three associates took title to the premises (R. p. 2), the deed being dated January 28, 1947 (R. p. 5).

On about January 28, 1947, Petitioner and his associates procured from Indiana Lumbermen's Mutual Insurance Company a fire insurance policy insuring the property against destruction by fire in the amount of $100,000 and insuring against loss of rents on account of such destruction in the amount of $15,000 (R. pp. 6, 11, 13, 143, 431).

The lease contains the following provision:

> "The premises are presently occupied by Char-Gale Manufacturing Company and Lessor undertakes and agrees that Lessor will deliver possession to Tenant on January 1, 1947, or as soon thereafter as possible but in no event later than February 1, 1947. * * *" (R. p. 79).

Respondent went into possession in February, 1947 (R. p. 525).

The Petitioner's own testimony shows that Petitioner and his associates purchased the property for income purposes; the insurance rate was high and Petitioner tried to keep the cost down as low as possible so that the income would be greater; it was up to the owners

to determine how much insurance they wished to carry on the property; and they did not expect General Mills to carry such insurance (R. pp. 145-146).

This was verified by E. W. Winter, an employee in the Comptrollers' Department of Respondent, General Mills, Inc., in March, 1947, in a conversation with Irving H. Green in which Mr. Green said, "We are responsible for insurance on the building and we have fire insurance coverage" (R. p. 239). But Mr. Green stated that Respondent was responsible for public liability insurance (R. p. 239).

The provision of the lease headed "Tenant to Maintain Surrender Premises in Good Order" contains the following final clause:

> "and the Tenant agrees to return said premises peaceably and promptly to the Lessor at the end of the term of this lease, or at any previous termination thereof, in as good condition as the same are now in or may hereafter be put in, *loss by fire and ordinary wear excepted*" (R. p. 80). (Italics supplied.)

By the terms of the lease, the duty to make repairs to the roofs and outside walls rested upon the lessor (R. pp. 78, 82, 83, 88). The duty to make all other repairs rested upon tenant except that it was under no duty to make repairs in event of destruction or damage "by fire, or the elements, or through any other cause", and if the premises were so slightly injured by any of said causes as not to render the premises unfit for occupancy, the duty to make such repairs was expressly cast upon lessor under the paragraph quoted in the footnote*

"Destruction by Fire.

*"It is further agreed between the Lessor and the Tenant that if during the term of this lease the demised premises or the improvements thereon shall be injured or destroyed by fire or the elements, or through any other cause, so as to render the demised premises

On January 15, 1948, the building was for all practical purposes completely destroyed by fire except to the extent of some salvage (R. p. 5).

On about March 8, 1948, Indiana Lumbermen's Mutual Insurance Company paid Petitioner and his associates the total sum of $110,643.90 (R. p. 143). No attempt was made by the Petitioner and his associates to restore or rebuild the building, and it could not be restored or rebuilt within the 60-day period provided for in the lease provision quoted above (R. p. 140).

On March 17, 1948, Petitioner commenced this suit in the District Court to recover damages for the destruction of the building, the loss of future rents and the cost

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unfit for occupancy, or makes it impossible to conduct the business of the tenant thereon, or to such an extent that they cannot be repaired with reasonable diligence within thirty (30) days from the happening of such injury, then the Lessor may terminate this lease and the term herein demised from the date of such damage or destruction, and the Tenant shall immediately surrender the demised premises and all interest therein to the Lessor, and the Tenant shall pay rent only to the time of such surrender; and in case of any such destruction or injury the Lessor may re-enter and repossess the demised premises discharged of this lease, and may dispossess all parties then in possession thereof. But if the demised premises can be restored within sixty (60) days from the happening of the injury thereto, and the Lessor within fifteen (15) days from the occurrence of such injury elects in writing to so repair or restore said premises within sixty (60) days from the happening of the injury thereto, then this lease shall not end or terminate on account of such injury by fire or otherwise, but the rent shall not run or accrue after the injury and during the process of repairs, and up to the time when the repairs shall be completed, except only that the Tenant shall during such time pay a pro rata portion of such rent apportioned to the portion of the demised premises which are in condition for occupancy or which may be actually occupied during such repairing period. If, however, the demised premises shall be so slightly injured by any cause aforesaid, as not to be rendered unfit for occupancy, then the Lessor shall repair the same with reasonable promptness, and in that case the rent shall not cease or be abated during such repairing period. All improvements or betterments placed by the Tenant on the demised premises shall, however, in any event, be repaired and replaced by the Tenant at his own expense and not at the expense of the Lessor" (R. pp. 83-84).

"Repair of Premises After Fire.

of removal of debris, claiming that the building was destroyed as a result of Respondent's negligence (R. pp. 1-3).

The case was tried in October, 1948. The trial judge submitted special interrogatories to the jury. the jury answered the interrogatories, finding the fair and reasonable market value of the premises before the fire to be $135,000 (which, of course, reflected the capital improvements made by Respondent) and the value of the land after removal of debris to be $15,000, thereby finding damages for destruction of the building in the amount of $120,000. It also awarded Petitioner $3,678 for the removal of debris and $75,000 as the present value of the future rents, and entered a general verdict in the total amount of $198,678 (R. pp. 471-472).

Respondent moved to set aside the verdict and enter judgment for defendant and, in the alternative, for a new trial, on several grounds (R. pp. 475-486). The trial judge denied the motion, except that he granted a new trial as to the issue of damages only, he having recognized that the measure of damages submitted allowing recovery for future rents was improper (R. pp. 498-499). With respect to the measure of damages on the partial new trial, the Court said:

> "The Court concludes, therefore, that in the event of a new trial the measure of damages is the difference between the fair and reasonable market value of the premises, burdened or blessed with the lease, immediately before the fire, and the fair and reasonable market value of the premises immediately after the fire before the debris was removed * * *" (R. p. 500).

The case was called for partial retrial on October 12, 1949, and the parties stipulated that:

> "if the issue of damages were submitted to a jury in accordance with the order of this Court denying defendant's motion for judgment and granting a new trial as to the issue of damages only, dated May 6, 1949, the jury would return a verdict of $142,500.00 in favor of the plaintiff, including interest to date; * * *" (R. p. 504).

In footnote 6 on page 12 of the petition, Petitioner states that he "is out $31,856.10—the difference between the $142,500.00 stipulated and the insurance of $110,643.99 insurance received." This is inaccurate and misleading. The $142,500 was a negotiated figure stipulated to avoid necessity of a retrial. It included interest to date.

Actually, Petitioner suffered no out-of-pocket pecuniary loss. He and his associates paid $110,000 for the property, $80,000 of which they borrowed (R. p. 526). They contributed $1,000 toward a new roof and boiler (R. p. 139) and the cost of removing debris was $3,678 (R. p. 471). Against these expenditures they received $110,643.90 insurance money (R. p. 143) and still had the lot valued by the jury at $15,000 (R. p. 471). They also received $18,750 in rents (R. p. 449).

SUMMARY OF ARGUMENT

There Are No Special or Important Reasons for Granting a Writ of Certiorari.

A. The decision of the Court of Appeals is not in conflict with applicable local decisions on local law, but, on the contrary, is in accord with clear local law.

1. The Court of Appeals had a clear conviction that the District Judge erred in the interpretation which he placed upon the unambiguous phrase "loss by fire * * * excepted" in the light of clear local law, other provisions of the lease and the undisputed circumstances surrounding its execution (post p. 10).

   (1) Under Minnesota law, a contract between private parties relieving one such party from liability for negligence is not contrary to public policy, and the District Judge erred in holding to the contrary (post p. 12).

   (2) Under Minnesota law, such a contract should not be strictly construed but should be given a fair interpretation which will accomplish its purpose, and the District Judge erred in holding to the contrary (post p. 13).

   (3) The lease being a business lease should have been construed under Minnesota law as business men would construe it, and the District Judge erred in holding to the contrary (post p. 16).

   (4) Under the Minnesota rule, the word "fire" in the phrase "loss by fire * * * excepted" is unambiguous and should be given its plain and ordinary meaning. So construed, it includes a fire caused by negligence, and the District Judge erred in holding to the contrary (post p. 17).

   (5) The District Judge and the dissenting Circuit Judge were in disagreement as to the proper interpretation and application of Minnesota law, and both were in error (post p. 20).

(6) The provisions of the lease interpreted in the light of the undisputed facts surrounding its execution fully sustain the holding of the Court of Appeals that the cost of fire insursurance was included in the rent paid by Respondent; that Respondent in practical effect paid for the fire insurance; that it was the mutual intention of the parties that Respondent was to be relieved from liability for loss by fire regardless of negligence; and that the hazard was to be covered by fire insurance for which Respondent had paid; and the District Judge erred in holding to the contrary (post p. 27).

2. The Court of Appeals did not substitute its judgment on any issue of fact for that of the District Judge (post p. 33).

3. The Court of Appeals was not bound by the view expressed by the District Judge respecting the meaning of the contract (post p. 38).

4. The case was given unusually careful consideration by the Court of Appeals (post p. 40).

B. The case is not one of general interest or importance (post p. 43).

ARGUMENT

A. The Decision of the Court of Appeals Is Not in Conflict With Applicable Local Decisions on Local Law, But, on the Contrary, Is in Accord With Clear Local Law.

1. The Court of Appeals Had a Clear Conviction That the District Judge Erred in the Interpretation Which He Placed on the Unambiguous Phrase "Loss by Fire * * * Excepted" in the Light of Clear Local Law, Other Provisions of the Lease and the Undisputed Circumstances Surrounding Its Execution.

The only ground advanced by counsel for the grant of certiorari is that the Court of Appeals should have accepted the views of the District Judge respecting the interpretation of the phrase "loss by fire * * * excepted", because it presented a question of local state law; and particularly so because the dissenting Circuit Judge, who was also a resident of Minnesota and had had long experience in interpreting Minnesota law, reached the same conclusion in his dissenting opinion as the District Judge.

But the rule, which has been adopted and repeatedly stated in the Eighth Circuit, that the Court of Appeals will defer to the views of an experienced trial judge on a doubtful question of local state law, is always qualified by some further statement such as "unless convinced of error", "except for clear and convincing reasons", or so long as the determination of the trial judge "is not induced by a clear misconception or misapplication of the law".

Russell v. Turner (C. C. A. 8), 148 Fed. (2d) 562, at p. 565 (where the same three circuit

judges were sitting on the Court of Appeals as in the case here sought to be reviewed);

Nolley v. Milwaukee Railway (C. C. A. 8), 183 Fed. (2d) 566, and cases cited.

In the case at bar the Court of Appeals did accept the views of the District Judge insofar as they did not have a "clear conviction" that his views were erroneous. Thus the majority opinion states that:

> "In the opinion the (District) Court correctly stated the settled law in Minnesota that whether the lease provision exempted defendant from loss by fire caused by its negligence depended upon the intent of the parties to the contract and that that intent was to be determined by reading the contract as a whole in the light of the subject matter, surrounding circumstances, the objects and purposes and the natural meaning of the language used" (184 Fed. (2d) at p. 363; R. p. 538).

Thus far, the views expressed by the Court of Appeals were in complete accord with the views expressed by the District Judge (R. p. 492). It was only when the District Court came to apply other rules of local law to the interpretation of the lease that the Court of Appeals, as the majority opinion indicates, had a "clear conviction" that his views were erroneous and that they were "induced by a clear misconception of misapplication" of the local law. This conclusion by the majorty of the Court of Appeals was well founded for the following reasons:

(1) The Ruling of the District Court (Which the Court of Appeals Reversed) Was Induced by Its Erroneous Belief That a Contract Relieving a Private Party from Liability for His Own Negligence Was Contrary to the Public Policy of the State of Minnesota.

The District Judge was of the opinion that a contract relieving a party from liability for his own negligence—

> "would contradict the public policy which holds that persons who commit a negligent act are responsible for the result of that act. Public policy must be consistent, and, consequently, requires that contracts which seek to negative liability for negligence must be clear * * * and must be strictly, not liberally, construed" (R. 493).

This belief of the District Judge constitutes the premise upon which his conclusion that the clause did not relieve Respondent from liability for its own negligence was based. It was because of his fundamental error as to the public policy of Minnesota regarding such an exculpatory clause that the District Judge held that the lease provision relieving defendant from liability for "loss by fire" must be strictly construed and therefore must be construed not to cover a fire attributable to negligence. The lease in question is a Minnesota lease. It was executed in Minnesota. The property lease is situated in Minnesota. And as the majority opinion of the Court of Appeals points out—

> "When we turn to the Minnesota law we find nothing to impugn the validity and binding effect of the contract to release the tenant. On the contrary, the highest public policy is found in the enforcement of the contract as it was actually made. *Santa Fe Railway v. Grant Bros.*, 228 U. S. 177, 188. We find the following Minnesota decisions fully support a contract between private parties relating to their private relationships to relieve one of such

parties from liability for his own negligence; *Pettit Grain Co. v. Northern Pacific Ry. Co.,* 227 Minn. 225, p. 230, 35 N. W. (2d) 127, p. 130; *Weirich v. Hamm Realty Co.,* 179 Minn. 25, p. 28, 228 N. W. 175, p. 176; *Commercial Union Assurance Co. v. Foley Bros.,* 141 Minn. 258; p. 261, 169 N. W. 793, p. 794; *James Quirk Milling Co. v. Minneapolis & St. Louis R. Co.,* 98 Minn. 22, 107 N. W. 742; *Michigan Millers Mutual Fire Ins. Co. v. Canadian Nor. R. Co.* (D. C.), 58 F. Supp. 326, affirmed, 8 Cir., 152 F. (2d) 292" (184 Fed. (2d) at p. 366; R. p. 543).

(2) The District Court Committed Error in Holding That Such a Contract Should Be Strictly Construed.

Directly contrary to the opinion of the District Judge, the rule, which obtains in some jurisdictions, that such contracts should be strictly construed has been specifically and explicitly rejected by the Supreme Court of Minnesota. Thus, in *Northern Pacific Railway v. Thornton Bros. Co.,* 206 Minn. 193 at p. 196-7, 288 N. W. 226, at p. 227-8, the court said:

> "If a contract transgresses the law or contravenes public policy, it is void. If it does neither, the parties are within their rights and the contract *should not have an arbitrary,* that is, an unduly liberal *or harshly strict, construction, but a fair construction that will accomplish its stated purpose.* That is the rule we apply to statutes (citing authority), and we see no reason why it should not apply also in the field of contract law. Our duty is the same in both domains—to effectuate the declared purpose of the statute, if within constitutional power, and of the contract, if within the scope of lawful contractual objectives. * * * A party may properly bargain for indemnity against his own negligence where the latter 'is only an undesired possibility in the performance of the bargain, and the bargain does not tend to induce the act.' * * *

"Neither law nor public policy prevents the ordinary contractor from buying from a third party indemnity from the pecuniary result of his own negligence. That is legitimate as insurance. How does the same process, with identical result, become illicit simply because they are those of the original and basic contract rather than a collateral one for conventional insurance? See 19 Minn. L. Rev. 471; 22 Id. 107.

"The view just expressed is enough to show why *we do not follow the cases which seem to thwart contractual intention solely upon the ground that to give literal effect thereto would relieve a contractor from the legal result of his own negligence*" (Italics supplied).

In his memorandum opinion the District Judge cites as authority for his statement that the strict construction rule is applied in Minnesota the case of *Gross v. General Investment Co.,* 194 Minn. 23, 259 N. W. 557 (R. p. 493). The cited case does not support the point upon which it is cited for the following reasons:

(1) The question before the court did not in any respect involve whether or not the contract provision was broad enough to include negligence of any one. The contract in that case was a contract of indemnity, and the sole question was whether or not the indemnity contract *covered the acts and omissions of the indemnitee;*

(2) There is not one word in the court's opinion relating to the rules of construction applicable to such a contract;

(3) If it could be implied from the resultant holding that the strict construction rule was applied (as the District Judge assumed) then the case is clearly overruled by the later case of *Northern Pacific v. Thornton Bros.* (supra, p. 13).

In further support of his determination that the strict construction rule applies in Minnesota, the District Judge in his memorandum opinion cites *Williston on Contracts,* Sec. 1751 (c) (R. p. 493). Williston does lay down the general rule in favor of strict construction, but obviously regarded Minnesota as presenting an exception to that rule for he says in a footnote (p. 4969)

> "BUT SEE Weirick v. Hamm Realty Co. (179 Minn. 25, 228 N. W. 175)."

The provisions of the exculpatory clause in the *Weirick* case were described by the Minnesota Supreme Court in its opinion as follows:

> "It provides that 'the lessor shall not be liable * * * for any *accidental* damage to person or property' resulting from the several causes enumerated 'or that may be caused by the lessor's employees' " (179 Minn. at p. 27; 228 N. W. at p. 176 (Italics supplied).

Construing this clause the Supreme Court of Minnesota said:

> "It expressly exempts defendant from liability for accidental damage by defendant's employees; in other words, from liability for the negligence of such employees" (179 Minn. at p. 27, 228 N. W. at p. 176).

The term "accidental damage" was expressly held by the Minnesota Court to include damage caused by the negligence of the lessor's employees, as well as by their acts not involving negligence. This certainly did not place a strict interpretation upon the exculpatory clause for under a strict interpretation the term "accidental damage" would obviously have been confined to instances where there was no negligence upon the part of lessor's employees. The ruling of the Minnesota Supreme Court

in the *Weirick* case is directly in line with the rule of interpretation laid down by the same court in the later *Thornton Bros.* case (supra) that such a contract should not be strictly construed but should be given a "fair construction that will accomplish its stated purpose".

(3) The District Court Committed Error in Refusing to Construe the Business Lease Before It in the Way That Business Men Would Construe It.

The District Judge further erred in refusing to construe the lease as business men would construe it. The lease was a business lease executed between business men, but the trial judge said—

> "It does not seem desirable to enunciate in Minnesota a broad rule which would apply to the interpretation of all leases like the instant one upon the premise of what business men generally may be presumed to have had in mind when such a contract was made."

But the Minnesota Supreme Court has ruled to the exact contrary as have many other courts.

William Lindeke Land Co. v. Kalman, 190 Minn. 601, 252 N. W. 650, in which the court said:

> "It was the duty of the court to ascertain what these plain business men had agreed among themselves and to give effect to that meaning, unless it was found contrary to express law or to a paramount interest known as public policy."

North German Lloyd Co. v. Guaranty Trust Co. (Holmes, J.), 244 U. S. 12, at p. 24.

E. I. Dupont deNemours & Co. v. Clairborne-Reno Co. (C. C. A. 8), 64 Fed. (2d) 224 at p. 228.

Outlet Embroidery Co. v. Derwent Mills, Ltd., 254 N. Y. 179, 172 N. E. 462.

Shirai v. Blum, 239 N. Y. 172, 146 N. E. 194.

Interpreting the contract provision in this business lease in strict accord with the rule laid down by the Minnesota Supreme Court, the Court of Appeals properly held that by the provision that upon termination of the lease the tenant should return the property in good condition "loss by fire * * * excepted", the parties meant a loss by fire—

> "such as is always meant when men are talking or are figuring on the risk of it in business dealings—i.e., the 'loss by fire' which always is insured against in ordinary course * * *
>
> "When the lease here is so read and understood the agreement of the lease is simple, normal and reasonable and such as intelligent men would be expected to agree upon" (184 Fed. (2d) at p. 366; R. p. 543).

(4) Under the Minnesota Rule the Word "Fire" in the Phrase "Loss by Fire * * * excepted" Is Unambiguous and Should Be Given Its Plain and Ordinary Meaning and So Construed Includes a Fire Though Caused by Negligence.

The word "fire" as used in the phrase "loss by fire * * * excepted" on its face is an unambiguous word. Given its plain and ordinary meaning it clearly includes a fire whether or not caused by negligence. A fire so caused can only be excluded by giving the word "fire" a narrower meaning than it has in common parlance; in other words, by placing a strict construction upon it for reasons of public policy.

As the Court of Appeals in its opinion pointed out (184 Fed. (2d) at p. 364; R. p. 540).

> "Though the word 'fire' in the phrase is unqualified and inclusive and therefore unambiguous, the courts may, as they have in instances cited in the (District) court's opinion and in the briefs, consider whether a contracting for exemption from lia-

> bility for one's own negligence should not be favored or enforced by courts or is contrary to public policy and they have by 'strict construction'—that is, by giving the word 'fire' a narrower meaning than it has in common parlance, excluded negligently caused fires from such an exemption."

Cases so holding include the decision of the Supreme Court of Washington in *Carstens v. Western Pipe & Steel Co.*, 142 Wash. 259, 252 Pac. 939, where the lease also relieved the defendant from liability for "damage * * * by fire".

Construing this contract provision, the Washington court said:

> "Did that clause mean that the lessee was to be relieved from fires which were the result of its own negligence? We ought not to come to that conclusion, unless the lease definitely and certainly so expresses itself * * * If the parties intended such a contract we would expect them to so state in clear terms" (142 Wash. at p. 265, 252 Pac. at p. 941).

So the Washington court, in interpreting the clause, read an adjective such as "unpreventable" or "accidental" into it and interpreted it as though it read "damage by unpreventable (or accidental) fire excepted". In other words, for reasons of public policy, it placed a strict construction upon the clause.

The opinion of the District Judge in the case at bar indicates that he preferred the rule of interpretation as laid down by the Supreme Court of Washington in the *Carstens* case, for of that decision he said—

> "The Carstens case appears to be practical, logical and sound. Its rule is consistent with the general and necessary public policy * * * that liability for negligence cannot be escaped unless a mutual intent to permit it is clearly established * * * The case enunciated a rule based upon a sound public policy and is the proper one to adopt in this case" (R. p. 495).

But, as the opinion of the Court of Appeals in the case at bar clearly indicates, the decision of the Washington court in the *Carstens* case was the result of its conclusion that for reasons of public policy such an exemption should be strictly construed. But the Minnesota Supreme Court has taken a position directly contrary to the *Carstens* case and has repeatedly ruled that such a contract exemption is not contrary to public policy and has expressly and explicitly repudiated the doctrine that it should be strictly construed.

Instead of giving the word "fire" as used in the exemption clause its plain and ordinary meaning, the District Judge (as the Court of Appeals pointed out in its opinion)—

> "approached the inquiry as to what was in the minds of these parties and what they meant in respect to the happening of loss by fire of the leased property from considerations of abstractly possible meanings of 'loss by fire' in the paragraph of the lease where the words are found and of the public policy involved in contracting against obligation for one's own negligence and of whether the word 'fire' in the lease ought to be strictly construed against or liberally construed in favor of the tenant. Through its approach and course of reasoning it came to the conclusion that the parties did not intend that the tenant should be relieved from liability for a loss by fire if the fire occurred in the ordinary way in which fires in manufacturing plants occur but that they meant that the tenant should be so relieved only if the fire occurred in some such extraordinary way not illustrated by example as to present nothing on which a jury could find negligence as a cause thereof. The interpretation so put upon the covenant of the lease for exemption of the lessee from liability for loss by fire reduced the covenant for exemption as a practical matter to triviality so far as General Mills was concerned" (184 Fed. (2d) at p. 364; R. p. 359).

The line of reasoning which the District Judge adopted in reaching his conclusion that the exemption provision did not relieve Respondent from liability for its own negligence might have been proper in a jurisdiction where such a provision is deemed contrary to public policy and is therefore strictly construed against the party claiming the exemption. But it was manifestly improper in the State of Minnesota where the rule of strict construction does not obtain. The word "fire" as used in the exemption clause in this Minnesota case should have been given the meaning which it has in common parlance.

(5) The District Judge and the Dissenting Circuit Judge Were in Disagreement Respecting the Proper Interpretation of the Minnesota Law.

The dissenting Circuit Judge thought that—

> "the covenant to surrender the premises in good condition 'loss by fire and ordinary wear excepted' reasonably may not be construed to relate to the lessee's tort liability, but only to its contractual liability to make repairs or rebuild in case of destruction of the building by fire" (184 Fed. (2d) at p. 370; R. p. 551).

But the District Judge was of the contrary opinion. His opinion is devoted to a discussion of whether the exculpatory clause should be construed to include or exclude negligence (Rec. pp. 492 et seq.). If construed to include negligence then it was his viewpoint that it would constitute a defense to the lawsuit.

That was also the viewpoint of the Supreme Court of Washington in *Carstens v. Western Pipe & Steel Co.*, 142 Wash. 259, 252 Pac. 939, cited in the opinion of the District Judge.

But the *Carstens* case was not instituted by the landlord to recover for breach of any covenant in the lease. *It was expressly bottomed upon negligence.* As the Washington court in its opinion states:

> "The plaintiffs brought this suit against the defendant to recover their damage because of the fire *and expressly base their cause of action on the alleged negligence of the defendant*" (142 Wash. at p. 260; 252 Pac. at p. 939).

And the briefs of plaintiffs' counsel in the Supreme Court of Washington contained this statement on page 3:

> "The complaint is based *wholly upon the theory of negligence and not upon any breach of contract.*"

But the opinion of the Washington court from beginning to end treats the quoted clause of the lease as a defense to the action for negligence if it was broad enough to cover fires caused by the tenant's negligence. Thus the court said that the question for its determination was, "did that clause mean that the lessee was to be relieved from fires which were the result of its negligence". 142 Wash. at p. 265, 252 Pac. at p. 941.

And it was only because the Supreme Court of Washington felt that the quoted clause should be strictly construed and that thus construed it did not cover fires caused by the lessee's negligence, that it held the lessee liable.

The petition for certiorari and the opinion of the dissenting Circuit Judge lay stress upon an early decision of the Minnesota Supreme Court in *Wright v. Tileston,* 60 Minn. 34, 61 N. W. 823. In the cited case the plaintiff sued for damage to the leased premises alleged to have been caused by the tenant's negligence. *There was no provision at all in the lease relieving the tenant from injury caused by its negligence.*

The only exception in his covenant to return the property in as good condition as when received was "reasonable wear and tear and damage by the elements alone excepted".

Although the *Wright* case was argued to Judge Nordbye, he was not impressed by this decision and in fact by relying on the decision of the Washington Supreme Court in the *Carstens* case (supra, p. 20) he impliedly rejected the application of the *Wright* case. Furthermore, a careful reading of the *Wright* case leaves no doubt that it has no application whatever in the instant case. The exception in the *Wright* case was limited to damage by the elements and obviously would not cover negligence. The question in the instant case is not whether a tort action lies in cases where the exception clause clearly does not cover tort liability, but rather whether a tort action is available when the exception clause does cover damage by tortious conduct. Carrying the decision of the dissenting Circuit Judge to its logical conclusion, he would have to contend that even had the lease specifically provided "loss by fire, *including fire caused by the negligence of the tenant*", the provision nevertheless would not excuse the tenant from liability in a tort action but only from liability in a covenant action.

But the District Judge was not in accord with the views thus expressed by the dissenting Circuit Judge. He was obviously of the opinion that if the exception did cover a fire caused by Respondent's negligence, it would constitute a defense to the instant tort action (supra, p. 20). That also was the holding of the Washington Supreme Court in the *Carstens* case, of which the District Judge said that it—

"appears to be practical, logical and sound * * * The case enunciated a rule based upon sound public policy and is the proper one to adopt in this case" (R. p. 495).

The dissenting Circuit Judge in his opinion in the case at bar says:

"I think the case of *Slocum v. Natural Products Co.*, 292 Mass. 455, 198 N. E. 747, upon which the defendant relies, is not controlling or even persuasive. That was a suit by the lessors against a lessee for a breach of a covenant in a lease 'to make all repairs, both outside and inside usual or necessary to keep the demised premises in good repair and condition in every respect during the term of this lease, damage by fire or unavoidable casualty only excepted'. The court said:

'* * * We think the exception includes fires resulting from negligence of the lessee, and therefore in the popular sense 'accidental'. It does not necessarily follow that the lessor would have no action in tort for the damage sustained.'

"The case, therefore, clearly does not hold that the exception in the covenant of the lease exonerated the lessee from tort liability" (184 Fed. (2d) at p. 371; R. p. 553).

But the dissenting Judge in so stating overlooked the fact disclosed in an earlier portion of the opinion of the Massachusetts court that there was in that case—

"evidence of circumstances raising a strong suspicion that the fire was deliberately set by an officer of the defendant" (292 Mass. at p. 456, 198 N. E. 747, at p. 748).

It was in the light of this fact that the Massachusetts court after stating:

"We think the lessee was to be excused *from liability for damage* caused either by fire or by unavoidable casualty. This is the natural meaning of the words used * * * There are sound reasons why

> a lessee who has no permanent interest in the property should seek relief from the burden of repairing or restoring the premises after fires in general, *at least if not intentionally caused* by himself. We think the exception includes fires resulting from negligence of the lessee, and therefore in the popular sense 'accidental' ",

added the further comment:

> "It does not necessarily follow that the lessor would have no action in tort for the damage sustained. *For the purposes of this case we need not decide whether in view of the language elsewhere in the lease the exception would include a fire intentionally set by the lessee. We may assume, but without deciding, that it does not extend that far.*" (Italics supplied.)

In other words, all that the court meant by its added comment partially quoted in the opinion of the dissenting Circuit Judge was that the lessor might still have an action in tort if he could establish that the fire was an incendiary fire set by the tenant itself.

Brophy v. Fairmont Creamery Co., 98 Nebr. 307, 152 N. W. 557, was also cited by petitioner and in the opinion of the dissenting Circuit Judge (R. p. 553). Like the *Carstens* case, it obviously comes from a jurisdiction where, unlike Minnesota, the rule of strict interpretation of such a lease provision is in full force. The lease in that case provided that upon its termination—

> "peaceable possession of such premises will be given (lessor) in as good condition as the same now are, and as shall be consistent with the due performance of the several covenants herein contained, and subject also to the usual wear, inevitable accident and loss by fire."*

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*Quoted verbatim including punctuation from the official transcript filed in the Supreme Court of Nebraska. In the published reports of the Supreme Court's opinion, through some error, a comma incorrectly appears after the word "accident" in the phrase "inevitable accident and loss by fire."

Placing a strict interpretation upon this clause the court held that it did not relieve the tenant from a fire caused by its negligence. In addition to the fact that the court placed a strict interpretation upon the exculpatory clause, there was however some justification for its ruling because the adjective "inevitable" preceding as it did both "accident' and "loss by fire" may have been considered to have qualified "fire" as well as "accident". In our case the exception clause reads "loss by fire and ordinary wear excepted". In marked contrast to the *Brophy* case, qualifying adjectives to limit the broad meaning of the phrase "loss by fire" are conspicuous by their absence. If in our case the parties had intended to in any wise limit the broad meaning of "loss by fire", some adjective such as "inevitable" would have preceded those words, just as the adjective "ordinary" is used in our case before the succeeding word "wear". The presence of the qualifying adjective "ordinary" before the succeeding word "wear" in contrast to the omission of any qualifying adjective at all before the preceding words "loss by fire" indicates clearly that in our case the parties did not intend to in any way limit the broad meaning of "loss by fire" and intended it to cover fires caused by negligence as well as other kinds of fires.

Apropos to the foregoing discussion we quote from the majority opinion of the Court of Appeals in the case at bar:

> "Examination of the lease reveals a studied effort to state in detail every one of the very numerous obligations imposed on the tenant and to impose specific liability and accord remedy to the landlord for each and every breach regardless of negligence, but in respect to the all important matter of loss by fire of the manufacturing plant which was ever present in the minds of the parties, no obligation was imposed and nothing was said about it

> except that the tenant was relieved from liability. Considering the minute particularity in specifying every liability of the tenant, it is not creditable that the liability for negligence causing loss by fire would not have been specified if there had been any intention that there should be such liability" (184 Fed. (2d) at p. 365; R. pp. 541-2).

The petition for certiorari contains the following further statement:

> "It is noteworthy that the court below, less than two months after the instant decision (three different judges sitting), affirmed a judgment for the lessor in his suit against the lessee for negligently causing the leased premises to burn. *Standard Brands v. Batemen* (8th Cir., Nov. 13, 1950), 184 F. (2d) 1002."

But that was a very different case from the instant case. The building on the leased premises had been destroyed by a fire caused by the tenant's negligence. But the tenant's covenant to return the premises read, "reasonable wear and tear and damages by the elements only excepted". Of course, such a covenant did not relieve the tenant from a negligently caused fire. No one could so contend. The clause in the *Bateman* case is identical with the clause in the case of *Wright v. Tileston,* supra (pp. 21-22). What has been said regarding the *Wright* case is equally applicable here.

(6) The Provisions of the Lease Interpreted in the Light of the Undisputed Facts Surrounding Its Execution Fully Sustain the Holding of the Court of Appeals That the Cost of the Fire Insurance Was Included in the Rent Paid by Respondent; That Respondent in Practical Effect Paid for the Fire Insurance, and That It Was the Mutual Intention of the Parties That Respondent Was to Be Relieved from Liability for Loss by Fire Regardless of Negligence, and That That Hazard Was to Be Covered by the Fire Insurance for Which the Respondent in Practical Effect Had Paid.

As a general rule, as the Massachusetts court said in *Lothrop v. Thayer,* 138 Mass. 466, at p. 475—

> "consciously or unconsciously, the cost of the insurance to the landlord, or the value of the risk, enters into the amount of the rent"

which the tenant is required to pay under the lease. In answer to this contention the opinion of the District Judge argued—

> "There is no evidence that plaintiff paid the premiums out of his rent, rather than from any other funds on hand. Defendant has not shown that the premiums which the insurance company received were derived from the rental payments. No separate part of the rent money was earmarked for insurance money and part for rent, and it does not appear that the insurance premiums entered into the determination of the rental price" (R. pp. 496-7).

It is true that there was no express statement made by any one that the cost of the fire insurance was taken into consideration in fixing the rent. But the circumstances surrounding the leasing of the property by the former owner to the Respondent, and the purchase of

the property by the Petitioner and his associates from the former owner, subject to the lease, leads unmistakably and irresistably to that conclusion.

The Petitioner and his associates (including Mr. Green, his attorney) were not the owners of the property when the lease to the respondent was executed, but they were negotiating for its purchase from the former owner, and it stands undisputed that they were only willing to make the purchase if the lease to the Respondent, which they participated in negotiating and with the terms of which they were fully familiar, was first executed. It is conceivable that if they were already owners of the property they might have been willing to lease it to the Respondent at a rental which would not reimburse them for the cost of the insurance. Conditions might conceivably have existed which would have made it good business judgment for them to do so.

But it is inconceivable that they would themselves negotiate a lease for a term of ten years, buy the property subject to the lease which they themselves had negotiated, containing the provision exempting the tenant from "loss by fire", and take out insurance to protect against the fire hazard, unless they thought that the rental payable by the Respondent under the lease would yield them a fair return after all expenses, including the cost of the fire insurance, had been paid. Human nature just simply does not operate that way.

We emphasize again that in the case at bar, the leasing of the property by the former owners to the Respondent under the lease containing the provision expressly exempting Respondent from "loss by fire", the sale of the premises to the Petitioner and his associates subject to the lease, which they had participated in negotiating, and the procuring by the Petitioner and his

associates of the insurance from the intervenor to protect against the fire hazard, *were all done as parts of one entire transaction* (R. pp. 139, 145, 522-526).

Certainly, in this situation they either "consciously or unconsciously took the cost of the insurance into consideration in fixing the rental payable under the lease. We think it obvious that they did so "consciously" because they would never have agreed to purchase the premises subject to the lease *negotiated at the same time* unless they figured that it would yield them a reasonable net return after all expenses, including the insurance costs, were paid; and in order that this expectation should not be defeated they included an express provision in the lease that Respondent would not so use the premises as to increase the insurance rates thereon (R. p. 79).

These circumstances clearly demonstrate that the cost of the insurance was included in the rent and *it is significant that there is no denial of such fact* anywhere in the testimony, either by the Petitioner or by any of his associates. Instead it is confirmed by the following testimony of the Petitioner himself:

Questioned by Mr. Green, one of his associates:

> "Q. Counsel asked you about this policy of insurance for $100,000. Why didn't you take more than $100,000 worth of insurance ? * * *
>
> "A. The purpose of purchasing the property was for income purposes. The insurance rate was high and I tried to keep my cost down as low as possible so that the income would be greater" (R. p. 145).

and the following:

> "Mr. Beardsley: With respect to the insurance again, it was up to you to determine how much insurance you wished to carry, you owners of the property.
>
> "A. Yes, sir.

"Mr. Beardsley: And you didn't expect General Mills to carry insurance?

"The Witness: No, sir" (R. pp. 145-146).

It is also confirmed by the testimony of Mr. Winter of the Comptroller's Department of General Mills, who testified on cross examination by Mr. Green that after the lease had been executed Mr. Green had specifically advised him that the Petitioner and his associates were responsible for the fire insurance on the building and that they had already procured fire insurance coverage (R. pp. 237-239).

Inasmuch as Mr. Winter was not an officer of General Mills, this conversation between Mr. Green and Mr. Winter, occurring as it did after the lease was executed, of course has no significance except that Mr. Green's statements to Mr. Winter confirm the conclusion which must necessarily be drawn from the lease itself when read in the light of the clearly established fact that the cost of the fire insurance was included in the rental paid by Respondent. These facts clearly support the conclusion of the Court of Appeals quoted at p. 23 of the petition for certiorari that—

> "The circumstances also indicate the intention that the cost of the insurance would be taken out of the rentals. The investing for income purposes of their own and the borrowed money by the plaintiff's predecessors necessarily involved computing the rentals promised in the lease and deducting the costs of fire insurance at the applicable high rate (as the petitioner himself testified, "The insurance rate was high", R. p. 145). They could not estimate the income without considering both factors. They necessarily consciously figured on the rentals to be paid by the tenant as the source of the fire insurance premium and intended that the cost of the insurance was to come from the tenants. In practical effect, the tenant paid the cost of the fire insurance" (R. p. 543; 184 Fed. (2d) at p. 366).

Further provisions of the lease confirm the conclusion of the Court of Appeals. Thus, it was specifically agreed in the lease that Respondent would not use or permit anything upon the demised premises "that will increase the rate of insurance thereon" (R. p. 79). This provision indicates that it was contemplated between the parties, at the time the lease was executed, that the landlord would procure fire insurance and would assume the risk, of the fire hazard. So it was provided that the tenant was to be exempted from liability for "loss by fire", but should not make any use of the premises not contemplated by the lease which would increase the rate of insurance which the landlord was to procure. As the Court of Appeals pointed out—

> "All of the respective obligations which the landlord and the tenant assumed toward each other were set forth with meticulous care but the all important matter of 'loss by fire', in the fore front of the minds of the parties, was simply and effectively covered in the lease by squarely exempting the tenant from liability for 'loss by fire' and as a reciprocal provision by specifically obligating the tenant not to use or permit anything on the premises that will increase the rate of insurance thereon. The release of tenant from obligation or liability for 'loss by fire' removed all interest on the part of the tenant to exact specific obligations of the landlord in the lease in respect of fire insurance and the landlord was left free, as it wanted to be, to control the fire insurance as to amounts, terms and companies. The reciprocal obligations of the tenant to subordinate its use of the premises to the contemplated fire insurance requirements specifically referred to in the lease and the tenant's obligation to pay a rental agreed to in view of the fire insurance cost to the landlord, considered with the release of the tenant from loss by fire, completely and unequivocally express the mutual intention to relieve the tenant from loss by fire regard-

less of negligence and the provisions fully preserved the relating of the lease to the mutual understanding that loss by fire would be covered by fire insurance" (184 Fed. (2d) at p. 365; R. p. 541).

Further confirmation of the intention that the owners would look to their fire insurance to protect against the fire hazard is found in the paragraph of the lease headed "Destruction by Fire" and "Repair of Premises after Fire," quoted in full in the footnote at supra, pp. 4-5, of which the Court of Appeals said:

> "The lease also provides under the caption 'Destruction by Fire' that in case of a fire totally destroying the building the lessor had the option to terminate the lease or to rebuild. It appears that at the time General Mills signed the lease plaintiff's predecessors in interest did not own the property and General Mills signed on condition that 'it be executed (within a certain time) by a Lessor then having, in the opinion of Counsel for Tenant, good and merchantable title to the premises'. The landlords executed the lease within the time and bought the property subject to the lease for investment for income purposes. They paid $110,000 for it, of which they raised $80,000 'by mortgage.' The fire insurance rate on the plant leased for 'general manufacturing, warehouse and office purposes', was high because the fire risk was great. The reservation on the part of the landlords of the privilege to rebuild at their own expense without requiring contribution from the tenant (whether it had been negligent or not) is further strong indication of the mutual intention that the risk of the loss by fire should be carried as it was carried by a fire insurance company and that the tenant had no obligation in the event of loss by fire. Having borrowed most of the money to acquire the property the landlords contemplated rebuilding or restoring minor fire damage out of insurance money" (184 Fed. (2d) at p. 365, R. p. 542).

The petition for certiorari at p. 5 quotes the following provision of the lease—

> "There are no understandings or agreements outside of this lease" (R. p. 89).

No point based on the provision of this lease was made either in the District Court or the Court of Appeals. It is mentioned for the first time in the petition herein without comment. If petitioner now seeks to rely on this provision, the attempt comes too late. *Standard Brands v. Bateman* (C. C. A. 8), 184 Fed. (2d) 1002, at p. 1007.

Furthermore as the Court of Appeals in the statement just quoted from its opinion (at supra, page 31) pointed out there was no reason for exacting in the lease "specific obligations of the landlord" respecting insurance (184 Fed. (2d) at p. 365; R. p. 541).

2. The Court of Appeals Did Not Substitute Its Judgment on Any Issue of Fact for That of the District Judge.

But counsel say at p. 23 of their petition that "the underlying premise of the Court of Appeals' reversal is that there was a 'mutual understanding of the parties when the lease was entered into that loss by fire should be provided against by fire insurance coverage' " (184 Fed. (2d) at p. 364; R. p. 539), and that in so holding the Court of Appeals "in violation of a cardinal rule of appellate procedure substituted its determination of fact for that of the trial court"; and they continue at p. 25 that this assumption by the Court of Appeals "is so devoid of support as to indicate that the court really is holding that Petitioner's mere procurement of insurance somehow exonerates Respondent". And in a footnote at p. 25 they call attention to the fact that

the "fire insurance was not procured until January 28, 1947, approximately three months after the execution of the lease on November 1, 1946, two and one-half months after Petitioner's purchase of the property, and twenty-eight days after the first day of the lease's term".

Counsel omit to state that this entire continuous leasing and purchasing transaction, which started about November 1, 1946, contemplated the completion thereof by the taking of title by Petitioner and his associates and of placing Respondent into possession of the premises on or about February 1, 1947, and that the transaction evolved in just the way contemplated. Char-Gale Manufacturing Company, the previous owner, was not required to deliver title or possession until February 1, 1947 (R. p. 79). Petitioner and his associates did not take title from the previous owner until on or about February 1, 1947 (R. p. 2). Respondent did not go into possession until February, 1947 (R. p. 525). Therefore, the risk of loss by fire and the need for insurance to protect against that risk did not arise until February; and the fire insurance was issued by the intervening fire insurance company, as the footnote states, on January 28, 1947.

Furthermore, the contention of counsel that the Court of Appeals was improperly substituting its determination of a factual issue for that of the trial court is without merit. The Court of Appeals in its ruling was not determining *any issue of fact* at all. It was merely construing a written contract in the light of the facts surrounding the execution of the contract *which were established by undisputed testimony.*

The reasons given by the Court of Appeals for its conclusion that the lease relieved Respondent from lia-

bility for "loss by fire" whether or not caused by its negligence, show clearly that the court was not determining a factual issue. The court's reasons are briefly summarized as follows:

(a) The word "fire" was "unqualified and inclusive and therefore unambiguous", and ambiguity could only be imported into it because of some rule of public policy requiring that it be strictly construed (184 Fed. (2d) at p. 364; R. p. 540) (supra, pp. 17-18).

(b) There is no public policy in Minnesota inimical to resort to fire insurance covering loss by fire with or without negligence and therefore no reason for giving the word "fire" a strict construction or for attributing to it a narrower meaning than it has in common parlance (184 Fed. (2d) at p. 364; R. p. 540) supra, pp. 12-13).

(c) The facts surrounding execution of the lease (established by undisputed testimony) which showed that Petitioner and his associates were purchasing the property for investment and income purposes, and therefore necessarily took into consideration cost of the fire insurance in fixing the rent payable under the lease and that in practical effect Respondent paid for the fire insurance coverage, afforded further ground for not giving the word "fire" any narrower meaning than it has in common parlance (184 Fed. (2d) at p. 366; R. p. 543) (supra, p. 27).

(d) The reciprocal obligation which the lease imposed upon the tenant not to use or permit anything upon the premises which would increase the rate of fire insurance thereon afforded further indication that Petitioner was to look to fire insurance for protection against the fire hazard (184 Fed. (2d) at p. 365; R. p. 541) (supra, p. 31).

(e) The reservation to the landlords of the right to rebuild at their own expense without requiring contribution from the tenant (whether it had been negligent or not) was "strong indication of the mutual intention that the risk of loss by fire should be carried as it was carried by a fire insurance company and that the tenant had no obligation in the event of loss by fire" (184 Fed. (2d) at pp. 365-6; R. p. 542) (supra, p. 32).

(f) Considering the minute particularity which the lease evidenced in specifying every liability imposed upon the tenant, it was not credible that liability for a negligently caused fire would not have been specifically imposed if there had been any intention that there should be such liability (184 Fed. (2d) at p. 365; R. p. 542) (supra, p. 26).

(g) It was not necessary under the circumstances to "incorporate in the lease itself any express obligation of the landlord to take out fire insurance * * * The release of the tenant from obligation or liability for 'loss by fire' removed all interest on the part of the tenant to exact specific obligation of the landlord in respect to fire insurance and the landlord was left free as it wanted to be to control the fire insurance as to amounts, terms and companies" (184 Fed. (2d) at p. 365; R. p. 541) (supra, p. 31).

The hazard of fire is a risk against which, at the present time, as every business man knows, insurance can be procured at reasonable cost. The courts have frequently commented upon the changed conditions in the relations between landlord and tenant resulting from the fact that such insurance is available.

Whitaker v. Hawley, Brewer, J., 25 Kan. 674, at p. 688;

Wattles v. South Omaha Ice & Coal Co., 50 Neb. 251, 69 N. W. 785 (at p. 788), 36 A. L. R. 424, at p. 429;

Fuchs v. Goe, 62 Wyo. 134, 163 Pac. (2d) 783, at p. 798.

In these days it is a well established custom for the one upon whom a fire hazard rests to procure such insurance. Petitioner and his associates did procure such insurance and they did not expect Respondent to procure such insurance. Petitioner himself so testified on cross examination (R. pp. 145-6), and Mr. Green, his associate and counsel, shortly after Respondent went into possession of the demised premises, told one of Respondent's employees that "we are responsible for insurance on the building and we have fire insurance coverage", and your (Respondent's) responsibility was "for public liability insurance" (R. p. 239). These facts constitute further confirmation of the holding by the Court of Appeals that Petitioner was to look to his fire insurance for protection against the fire hazard and that Respondent was under no obligation for loss by fire, however caused.

Under the interpretation thus placed upon the lease by the Court of Appeals everything falls into a harmonious pattern. All of the provisions of the lease and all the acts of the parties—up to the time when Petitioner started this lawsuit—harmonize. The phrase "loss by fire excepted" means exactly what it says. The word "fire", unqualified and unrestricted, means fire—not just certain kinds of fires.

Petitioner's position on the contrary does not make for harmony. He is forced to contend that, contrary to

the rulings of the State Supreme Court, the word "fire" should not be interpreted to mean what it says; that for reasons of public policy it should be strictly construed and should be held not to mean "fire" but only certain kinds of fires, although the premise upon which his argument is based has been specifically and explicitly rejected by the State Supreme Court which has ruled that such a contract provision is not contrary to public policy and should not be strictly construed, but should be given the ordinary and usual meaning which it would have in common parlance.

And the Court of Appeals in reaching its conclusion was not determining any factual issue. All that it was doing was construing the written contract in the light of the undisputed facts surrounding its execution, and in so doing, as we shall see in the next following subdivision of this brief, it was not bound by the views expressed by the District Judge.

3. The Court of Appeals Was Not Bound by the Views Expressed by the District Judge Respecting the Meaning of the Contract.

Actually, the question presented to the Court of Appeals for determination in the case at bar involved merely the construction of a written contract. That was a pure question of law, because the written contract was before the court and the parol evidence of the circumstances surrounding its execution *was undisputed.* On such a question it is well established that the reviewing court is not bound by the conclusions of law of the trial judge respecting the meaning of the contract but is free to decide the question for itself and in numerous

cases in doing so it has reached an interpretation exactly contrary to that reached by the District Judge.

Kell v. Gross (C. C. A. 5), 171 Fed. (2d) 715, 716;

Crosley Radio Corp. v. Dart (C. C. A. 6), 160 Fed. (2d) 426, 431;

B. F. Drew & Co. v. Reinhard (C. C. A. 2), 170 Fed. (2d) 679;

United States v. Biggs Const. Co. (C. C. A. 7), 116 Fed. (2d) 768;

United States v. Wholesale Oil Co. (C. C. A. 10, 154 Fed. (2d) 745, 747;

American Republics Corp. v. Houston Oil Co. (C. C. A. 5), 173 Fed. (2d) 728;

Oklahoma Nat. Bank v. Great Lakes Ins. Co. (C. C. A. 7), 182 Fed. (2d) 283;

Dollar v. Land, Chairman (C. A., D. C.), 184 Fed. (2d) 245;

Lease v. Corvallis Sand Co., 185 Fed. (2d) 570, at pp. 576-577 (C. C. A. 9);

Bauman v. Franklin Co. Dist. Co. (C. C. A. 6), 135 Fed. (2d) 384.

In the case at bar there is no uncertainty at all as to what the law of the State of Minnesota is respecting the interpretation of a contract between private parties which undertakes to relieve one of them from liability for negligence. The law on that subject as laid down by the State Supreme Court is clear. It is:

(1) That such a contract is not contrary to the public policy of the State of Minnesota and is accordingly a valid contract (supra, p. 12);

(2) That such a contract should not be strictly construed but should be given a fair interpretation to accomplish its purpose (supra, p. 13);

(3) That when embodied in a contract between business men it should be construed by the court as business men would probably construe it (supra, p. 16).

Because, on account of diversity of citizenship the suit was heard in a Federal Court instead of a state court, the Court of Appeals was substituted as the reviewing court in place of the Supreme Court of Minnesota, and it was its clear duty to interpret the contract which it was called upon to consider, not in accordance with the view of the District Judge if they thought his views to be wrong, but as they thought the Supreme Court of Minnesota would have decided it if it had been the reviewing court.

Hughes v. Mutual Life Ins. Co. (C. C. A. 9), 180 Fed. (2d) 542, at p. 545;

Compana Engrav. v. Schenley Dist. Corp. (C. C. A. 9), 181 Fed. (2d) 876, at p. 879.

4. The Case Was Given Unusually Careful Consideration by the Court of Appeals.

In the case at bar the questions raised were given most careful consideration by the Court of Appeals. The case was argued orally before that Court on May 4, 1950 (R. p. 541). The questions involved were considered by the Court *for over four months* before its opinion was handed down on September 19, 1950. In its consideration the court had before it the opinion of the District Judge. It also had before it the briefs filed on behalf of the Petitioner and on behalf of the intervening insurer. It also had before it the decisions of the Supreme Court of Minnesota, laying down the rules for the interpretation of such a contract. And the judges joining in the majority opinion had before them not only the opinion of the District Judge but the opinion

of the dissenting Circuit Judge in which he concurred with the result reached by the District Judge and gave his reasons therefor in a long opinion obviously intended to constitute the opinion of the Court of Appeals. Furthermore the question was again brought before the Court of Appeals by a petition for rehearing which the court denied (R. p. 563).

The Circuit Judges participating in the decision had all had long experience in interpreting the law of the states within their Circuit including Minnesota. Judge Woodrough, who wrote the majority opinion, although never a resident of Minnesota, had been appointed to the Court of Appeals in 1933 and ever since that time had been passing upon questions of Minnesota law. Judge Riddick, likewise never a resident of Minnesota, had been appointed to the Court of Appeals on January 10, 1942, and ever since that time had been participating in decisions involving interpretation of Minnesota law.

The long space of time which elapsed between the oral argument of the case and the decision date indicates that the case was given careful and thorough consideration by the Circuit Court of Appeals; and the majority of the court, as the opinion states, ruled that—

> the provisions of the lease *"completely and unequivocally* express the mutual intent to relieve the tenant from loss by fire" (184 Fed. (2d) at p. 365; R. p. 541) and that
>
> "considering the minute particularity in specifying every liability of the tenant, *it is not credible* that liability for negligence causing loss by fire would not have been specified if there had been any intention that there should be such liability" (184 Fed. (2d) at p. 365; R. p. 542).
>
> *"It is very clear* in the light of all the provisions of the lease, the circumstances of its execution and

> the understanding about fire insurance coverage to which the lease was related that by the provisions that on termination of the lease the tenant should return the property in good condition 'loss by fire * * * excepted' the parties meant a loss by fire such as is always meant when men are talking about or figuring on the risk of it in business dealings—i.e., the 'loss by fire' which always is insured against in ordinary course and against which the landlords here intended to and did take out insurance in an amount greater than the owners' investment" (184 Fed. (2d) at p. 366; R. p. 543).
>
> "When the lease here is so read and understood the agreement of the lease is simple, normal and reasonable and such as intelligent men would be expected to agree upon. The fire which occurred and the consequent loss were within the contemplation of the parties and was covered as they meant that it should be by the fire insurance" (184 Fed. (2d) at p. 366; R. p. 543).

It thus appears from the majority opinion of the Court that the majority had a "clear conviction" that the District Judge's appraisal of the local law was erroneous and that it was induced "by a clear misconception and misapplication of the law".

They, therefore, properly refused to accept his conclusions and reversed his ruling.

B. The Case Is Not One of General Interest or Importance.

Petitioner is inconsistent in asserting the contrary at p. 18 of his petition. He there states that—

> "Whether or not such a covenant exculpates a lessee from liability for fire caused by his negligence, is obviously a question of general interest throughout the United States."

He then goes on to urge in his petition that the question is one of purely local law in respect of which the decision of the trial judge should be accepted as binding by the Court of Appeals.

As a matter of fact, all that the case decides is the liability of the particular Respondent as lessee under the terms of this particular lease in the light of the undisputed facts surrounding its execution and in the light of the rule of construction which obtains in Minnesota that such a lease provision is not contrary to public policy and should not be strictly construed. It can have no bearing as a precedent in instances where lease terms and the facts surrounding execution of the lease are different from those existing in the case at bar; and even then the decision in the case at bar will not be a precedent in those jurisdictions which hold that a covenant releasing a party from liability for his own negligence is contrary to public policy and should be strictly construed against such exemption.

Moreover, Petitioner's statement at page 18 of the petition that the clause "loss by fire and ordinary wear excepted" is apparently standard in American leases cannot be substantiated. In fact, it appears that quite the contrary is true. For example, the form book which is part of the set of *Thompson on Real Property* contains 55 short and long term lease forms of various types at

pages 667 to 1008. Of these only 19 have any surrender and return clauses at all. Only six contain any exception as to fire, and five of these clearly and unequivocally negate any exception as to loss by fire resulting from negligence. The clauses in the five read: "damage by fire and *other unavoidable* casualties excepted" (p. 668), "damages by fire *not occasioned by the negligence* of the lessee or the lessee's agent" (p. 669), "damage by fire or *other unavoidable* casualties excepted" (p. 683), *"accidental* fire or *other unavoidable* casualty excepted" (p. 686), and "damage by fire or *other unavoidable* casualty only, excepted" (p. 690). The only other one mentioning fire reads, "damage by fire, casualty and the elements excepted."

Counsel mention form No. 41-103 at page 1302 of *Jones, Legal Forms Annotated.* That form book contains 18 lease forms, Nos. 41-11 to 41-29, inclusive, of which only three, namely, forms 41-11, 41-22 and 41-25, have surrender clauses. The only exception in form 41-11 is "ordinary wear and tear and damage by the elements excepted." 41-22 contains the clause "deliver up * * * in good state and condition (damage by fire excepted) * * *." 41-25 excepts only "natural wear and tear."

Counsel also mention form No. 269 at page 598 of *Gordon, Standard Annotated Real Estate Forms* (1938). That is one of 14 forms shown, numbered 286 to 298. Six have no surrender clauses. Two contain no exceptions. One excepts wear and tear only, two except damage by the elements only, one excepts wear and tear and damage by the elements only, and two except reasonable wear and tear and damage by fire.

Thus, it is seen that clauses such as the one in the case at bar are not such standard covenants in American leases as to make the interpretation of the provision one of general interest throughout the United States.

CONCLUSION

Respondent respectfully urges that the reasons advanced for the granting of the Petition for a Writ of Certiorari have no substance, and the writ should be denied.

Dated at Minneapolis, Minnesota, February 24, 1951.

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CHARLES ELMORE CROPL
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IN THE

Supreme Court of the United States

October Term, 1950

No. 523

HARRY GOLDMAN, Petitioner,

vs.

GENERAL MILLS, Inc., a Corporation.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Much of respondent's opposing brief seems appropriate only as argument on the merits. However, certain statements therein might occasion misimpressions as to factors relevant to the grant of certiorari, and these should be corrected briefly.

I.

This Case Is of Interest Throughout the United States.

Respondent argues that the case is not one of general interest or importance, but only concerns the parties (Brief Opposing Certiorari, pp. 43-45).

We think it sufficient to point out that this case, decided only last fall, already has evoked a leading law review article, "An Inductive Approach to the Liability of the Tenant for Negligence," subtitled: *"Goldman, et al. v. General Mills, Inc.",* William Conant Brewer, Jr., 31 Boston University Law Review 47 (January, 1951), in which the author states, "One of the most talked about cases in insurance circles last year was *Goldman v. General Mills, Inc.* * * *" (p. 47), and, "Few cases have made such a deep impression on insurance lawyers as *Goldman v. General Mills, Inc.* * * *" (p. 65).

While petitioner cannot endorse this article's substantive approach to the problem of this case, candor compells him to cite it to the Court to show that unquestionably the case at bar is of great interest throughout the country, and of vital concern to landlords, tenants, insurance companies and the bar.[1]

---

[1]In connection with respondent's contention that the clause "loss by fire and ordinary wear excepted" is not standard in American leases (Brief Opposing Certiorari, pp. 43-45), it is interesting to note this article's statement: "One of the most common provisions in American leases is the covenant to repair or return in good condition, similar to that in **Goldman v. General Mills,** with fire, wear and tear, unavoidable casualty, or damage by the elements the usual exceptions" (31 Boston University Law Review at 50).

II.

Petitioner Is Entitled to Rely Upon the Entire Lease.

We fail to see either logic or equity in respondent's claim (Brief Opposing Certiorari, p. 33) that petitioner is not entitled to invoke the paragraph of the lease providing:

> "There are no understandings or agreements outside of this lease" (R. 89).

This provision has been in the lease from its inception. Its effect is not to be granted or withheld as the contingencies of litigation may dictate.

The position of Chief Judge Nordbye, that under controlling Minnesota law the clause "loss by fire and ordinary wear excepted" clearly does not exculpate respondent from liability for negligent fire, may have obviated the necessity for emphasis of the above quoted paragraph up to the time of reversal below. That reversal is based squarely upon the assumption that there was a "mutual understanding of the parties when the lease was entered into that loss by fire should be provided against by fire insurance coverage" (R. 539; 184 F. (2d) at 364).

Not until this assumption was made was it important for petitioner to point out that such assumption, besides being unsupported by the evidence, contradicts the lease's own provision that "There are no understandings or agreements outside of this lease." Petitioner emphatically pointed this out in his petition for rehearing (R. 568-569).

It is the court of appeals' assumption that invokes attention to the significance of this provision of the

lease, and it is only fair that such provision be considered along with all the rest of the lease.

III.

Petitioner's Interpretation, and Not Respondent's, Produces a Harmonious Pattern of Construction.

Respondent argues that its construction of the clause "loss by fire and ordinary wear excepted" (R. 80) results in a harmonious interpretation of the lease as a whole (Brief Opposing Certiorari, p. 37). Exactly the contrary is the case.

Respondent altogether overlooks the lease's paragraph on "Liability of Lessor and Tenant," which contains the tenant's clear covenant "to save the lessor harmless" from "any act or neglect of the tenant" (R. 81-82; see Pet. pp. 3-4). Obviously this covenant is consistent only with that construction of the clause "loss by fire and ordinary wear excepted" which excludes negligent fire.

It is therefore Chief Judge Nordbye's and Circuit Judge Sanborn's construction of this clause, and not respondent's, which produces a harmonious pattern.

Respondent's construction puts the lease at war with itself. And such construction produces the absurdity of enabling a lessee to terminate a lease by negligently destroying the premises, in direct contradiction of Minnesota law (see Pet. p. 4, n. 1).

IV.

The Court of Appeals Invoked Factors Extrinsic to the Lease.

Respondent argues that petitioner's invocation of the rule of deference to the trial court on issues of fact, is wrong because the courts below were construing a written contract which involves only "conclusions of law" and "the Court of Appeals in reaching its conclusion was not determining any factual issue" (Brief Opposing Certiorari, p. 38).

But it is obvious that the court of appeals invoked factors extrinsic to the written lease: e.g., the assumed "mutual understanding * * * that loss by fire should be provided against by fire insurance" (R. 539; 184 F. (2d) at 364); petitioner's procurement of insurance; the nature of petitioner's investment; the manner of financing the investment; the circumstances of execution of the lease (R. 543; 184 F. (2d) at 366).

If such extrinsic factors are relevant to decision, we believe it is clear that the inferences to be drawn from them are for the trial court. At least, deference is due to the trial court, which was not accorded by the majority of the court of appeals. Cf. *O'Leary v. Brown-Pacific-Maxon, Inc.* (U. S. Sup. Ct., No. 267, Oct. Term, 1950, Feb. 26, 1951), 19 U. S. Law Week 4138.[2]

---

[2]The Minnesota rule clearly is that, on review, "inferences and conclusions from undisputed facts" as well as "findings on conflicting evidence" are for the trial court, even though "the construction of written or documentary evidence is involved." **Northwestern F. & M. Ins. Co. v. Connecticut Fire Ins. Co.**, 105 Minn. 483, 487, 117 N. W. 825; **Sommers v. City of St. Paul**, 183 Minn. 545, 551, 237 N. W. 427; **In re Estate of Calich**, 214 Minn. 292, 297, 8 N. W. (2d) 337. It would seem that, to effectuate **Erie R. Co. v. Tompkins**, 304 U. S. 64, a court of appeals, when sitting in a diversity case, should accord that deference to the trial court's inferences which the state appellate court would accord, whatever the federal rule in purely federal cases. Cf. **Woods v. Interstate Realty Co.**, 337 U. S. 535, 538, and authorities cited.

V.

Chief Judge Nordbye and Circuit Judge Sanborn Were in Accord.

Respondent contends that, although the only two experienced Minnesota jurists to pass upon this case reached the same conclusion, nevertheless they were in disagreement respecting the proper interpretation of Minnesota law (Brief Opposing Certiorari, p. 20).

It seems to us clear that, to the contrary and as stated by Judge Sanborn,[3] these experienced Minnesota jurists were in complete accord.

In sum, the opinion of Chief Judge Nordbye was that the clause "loss by fire and ordinary wear excepted" does not exculpate from liability for negligent fire, that is, that negligent fire, creating tort liability, is beyond the clause's scope (R. 492). The position of Judge Sanborn, that such clause has to do only with contractual liability and not tort liability (R. 551; 184 F. (2d) at 370) seems to us to be another way of stating the same proposition, or at most, only to carry Judge Nordbye's reasoning one step further, to its logical conclusion.

In other words, the clause has to do only with contractual liability; it does not affect tort liability; therefore it does not exculpate from liability for a negligent act. See *Arrowhead Springs Co. v. U. S.*, 67 Ct. Cls. 211, 233.

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[3]Circuit Judge Sanborn commenced his opinion by saying: "Had I been the District Judge before whom this case was tried, I am satisfied that my rulings upon the questions presented at the trial would not have differed from those which are challenged by this appeal" (R. 545; 184 F. (2d) at 367).

VI.

The Court of Appeals Departed from the Accepted and Usual Course of Judicial Proceedings.

The short of this case on the merits is simply this: As a matter of common law a tenant is liable for damages resulting from his negligence but is under no duty to make good damage resulting from accidents or the elements. However, a tenant's covenant to keep the premises in good repair, as here (R. 79-80; see Pet. 2-3), enlarges the tenant's liability and renders him liable to restore the premises even though destroyed by causes beyond his control, unless the enlarging covenant is limited by an exception. This, as Circuit Judge Sanborn stated, is the reason for the exception here "loss by fire and ordinary wear excepted" (R. 551; 184 F. (2d) at 370). Such exception does not exculpate from tort liability because it has nothing to do with tort liability. It has to do only with relieving the tenant from contractual liability which, but for the exception, would result from his covenant to keep the premises in good repair.

On the merits, it would be petitioner's function to show this beyond dispute.

The thing presently significant is that the majority of the court below, doubtless motivated by a feeling that the intervenor insurance company should not escape responsibility, determined to reach a conclusion which would prevent such escape, even in the teeth of controlling Minnesota law, as Circuit Judge Sanborn clearly shows (R. 560; 184 F. (2d) at 374; see Pet., p. 26). While, as respects the intervenor insurance company, there may be something in this conclusion of the "feeling for justice," it is grossly unfair and inequitable to

petitioner to make him bear the consequences of the tort feasor's negligence, just because petitioner paid the insurer to assume a portion of the risk.[4]

Most significantly for present purposes, the conclusion was reached not only in the face of the documented showing of the experienced Minnesota jurists, Judge Nordbye and Circuit Judge Sanborn, that Minnesota law is to the contrary, but without according any deference to the trial court's determination of local law; in fact, without citing a single Minnesota or other authority respecting the meaning of the covenant involved.

This is not the accepted or usual course of judicial proceedings. It is a clear departure therefrom.

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[4]Respondent's footnote (Brief Opposing Certiorari, p. 7) is inaccurate in several particulars, and we think quite misleading. The $142,500 stipulated figure represents the **agreed** damage resulting from the fire (R. 502-503) independent of petitioner's retention of the lot. The boiler installed at petitioner's expense alone cost $1,000; the new roof was in addition (R. 139; the record on this is ambiguous). The income from the property of course had first to be applied to expenses and investment charges.

Respondent indeed makes a strange argument—strange at law or in equity—when in substance it urges that because petitioner may have made a wise investment, he should bear the burden of respondent's negligence.

CONCLUSION

It is respectfully submitted that the decision below is not only contrary to Minnesota law but is a clear departure from the accepted and usual course of judicial proceedings. Therefore the petition for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit should be granted.

Dated Minneapolis, Minnesota, March 3, 1951.

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